

Litigation Under the Individuals with Disabilities Education Act After *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*

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In 2001, the Supreme Court handed down Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, which limited “prevailing party” status under two civil rights fees laws to claimants who achieve a judicially sanctioned change in the legal relationship of the parties.

This Article argues that there are various policy reasons against extending Buckhannon’s reach to IDEA. It then explores possible forms of settlement that could meet the requirements of Buckhannon despite not being a final judgment on the merits or a consent decree.

Further it predicts that if Buckhannon is allowed to apply to IDEA cases, the litigation strategies of both parties will be affected in a way that impairs the purposes of IDEA and prevents children protected under The Act to get quick, equal access to education. Finally, the Article argues that legislation can be enacted by either Congress or the states to reverse the application of Buckhannon to IDEA cases.

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I. INTRODUCTION

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,¹ the Supreme Court ruled that in order to be a “prevailing party” entitled to attorneys’ fees under the civil rights fees laws, the

¹ 532 U.S. 598 (2001). The decision came down on May 29.

claimant must achieve a judicially sanctioned change in the legal relationship of the parties.² This “judicial imprimatur” is found in a judgment on the merits of the case or a consent decree, but not in a voluntary change in policy by the defendant and a dismissal of the action.³ The Court overturned the “catalyst” theory,⁴ previously accepted by all but one of the regional courts of appeals, which allowed a claimant to obtain fees if the lawsuit provided the catalyst for a settlement or other voluntary response by the defendant that gave the claimant what the claimant wanted.⁵

Though *Buckhannon* resolved the immediate question whether civil rights plaintiffs may prevail simply by being catalysts without achieving a judgment or consent decree, the case raised other uncertainties. Will the case apply to all federal statutes that call for awarding fees to prevailing parties, or simply to the two statutes—the Fair Housing Act Amendments and the Americans with Disabilities Act—that were the basis of the suit in *Buckhannon*? Are there any dispositions that are neither judgments on the merits nor consent decrees but are close enough to either to support fees? How will parties’ litigation strategies change after *Buckhannon*?

Cases brought under the Individuals with Disabilities Education Act⁶ (IDEA) present difficult questions of these types. IDEA is the federal statute that provides for all children with disabilities to receive free, appropriate special education from the public schools.⁷ An administrative process resolves disputes over services,⁸ and parents are entitled to attorneys’ fees from school districts they prevail against.⁹ Before *Buckhannon*, that entitlement covered parents who prevailed when their claim had been merely a catalyst for the change they desired, even though the case had not reached a final decision or anything equivalent to a consent decree.¹⁰

IDEA is a highly significant statute. It protects the educational rights of about 6.3 million children.¹¹ Passage of the law in 1975 brought an end to an era in

² *Id.* at 605.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 601–02.

⁶ 20 U.S.C. §§ 1400–1487 (2000).

⁷ See 20 U.S.C. § 1412(a)(1)(A) (2000) (establishing guarantee).

⁸ *Id.* § 1415(n) (2000).

⁹ *Id.* § 1415(i)(3)(B) (2000).

¹⁰ See, e.g., *Holmes v. Millcreek Township Sch. Dist.*, 205 F.3d 583, 594 (3d Cir. 2000); *G.M. v. New Britain Bd. of Educ.*, 173 F.3d 77, 81 (2d Cir. 1999); *Phelan v. Bell*, 8 F.3d 369, 374 (6th Cir. 1993).

¹¹ See U.S. DEP’T OF EDUC., TWENTY-THIRD ANN. REP. TO CONG. ON IMPLEMENTATION OF IDEA, 2001, at II-17, II-21 (2002) (combining figures). An additional 205,769 children were protected under a portion of IDEA that does not explicitly provide for attorneys’ fees but does give other substantive and procedural rights. See *id.* at II-1 (discussing IDEA Part C services).

which 1.75 million children were out of school altogether, and 2.5 million were in programs inappropriate for their disabilities.¹² In a recent year, the administrative hearing process was invoked about 11,000 times.¹³ If *Buckhannon* is applied to special education litigation under IDEA, it will work a major change in the rights of the children in those disputes and the children who may be the subject of future disputes. If *Buckhannon* eliminates fee awards not just in mootness dismissals and informal settlements, but in anything but cases adjudicated on the merits or resolved by consent decree, the alteration is very significant indeed.

In a brief comment written shortly after the Supreme Court decision, I forecast that courts would apply *Buckhannon*'s language rejecting the catalyst rule to parents' requests for fee awards in disputes over the education of children with disabilities,¹⁴ and described some of the consequences of that anticipated extension.¹⁵ Nearly three years have passed since the *Buckhannon* decision, and there has thus been adequate time to assess the case's impact on special education fees litigation. This Article examines whether my prediction about the application of *Buckhannon* to special education cases has proven true, and further evaluates how courts should act in applying *Buckhannon* to special education disputes. My conclusion is that courts generally have applied *Buckhannon* to special education,¹⁶ but that this application is not justified. Applying *Buckhannon* ignores fundamental policies in the special education law in favor of rapid settlement of disputes;¹⁷ moreover, application of the case is incompatible with the IDEA mediation provisions¹⁸ and with the elaborateness of the IDEA fees scheme, the statutory entitlement to a free education, and the inability, at least

¹² H.R. REP. NO. 94-332, at 11-12 (1975).

¹³ U.S. GENERAL ACCOUNTING OFFICE, REP. NO. GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 2, 13 (Sept. 2003) (reporting 11,068 hearings requested and 3020 held in the year 2000), available at <http://www.gao.gov/new.items/d03897.pdf>.

¹⁴ In these cases, "the parents of a child with a disability who is the prevailing party" are eligible for an award of reasonable attorneys' fees. 20 U.S.C. § 1415(i)(3)(B) (2000). Many special education cases also include claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000), which has a similar fees provision, 29 U.S.C. § 794a(b) (2000), or the Americans with Disabilities Act, 42 U.S.C. §§ 12,101-213 (2000), which also has a similar fees provision, 42 U.S.C. § 12,205 (2000), one of the two fees statutes at issue in *Buckhannon*.

¹⁵ Mark C. Weber, *Special Education Attorneys' Fees After Buckhannon* Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources, 2002 BYU EDUC. & L.J. 273. Although the article appeared in 2002, it was written and accepted for publication in August, 2001, and thus represents a very preliminary effort to come to grips with the implications of *Buckhannon*.

¹⁶ See *infra* text accompanying notes 106-37.

¹⁷ See *infra* text accompanying notes 152-56.

¹⁸ See *infra* text accompanying note 150.

according to some courts, to sue pro se for IDEA violations.¹⁹

This article also considers the fate of fees petitions under various forms of settlement that are not precisely analogous to the disposition in *Buckhannon* but are not consent decrees or judgments on the merits. I note that agreed orders written into a hearing officer's decision are likely to support fees, and I catalogue the likelihood of success of other forms of disposition.²⁰ I conclude that courts must find agreements reached at mediation to support fees in order to not undermine the purposes of the IDEA's mediation provisions.²¹

This Article goes on to discuss how parties are likely to act if *Buckhannon* does apply to special education cases, suggests some of the strategies that parents' and school districts' lawyers are apt to employ, and then discusses some policy implications of those actions. I conclude that school districts will try to moot cases and will try to play the parents' need for fees for the attorney against the parents' desire to get all the services they can for their child.²² Parent attorneys will respond with strategies to avoid mootness, such as extreme demands for relief, claims for damages, and class action claims.²³ The effects of some of these strategies will ultimately be harmful to the children that IDEA is there to protect, as disputes become protracted and damages claims raise tempers between parents and school officials.²⁴ The Article winds up by assessing prospects for federal or state legislative change to end the application of the *Buckhannon* rule in special education controversies.²⁵

The topic of special education fees in light of *Buckhannon* is new enough that extant scholarship is sparse,²⁶ although the list of more general articles on *Buckhannon* is growing.²⁷ Extensive pre-*Buckhannon* scholarship commented on

¹⁹ See *infra* text accompanying notes 157–69.

²⁰ See *infra* text accompanying notes 170–72, 186–238.

²¹ See *infra* text accompanying notes 173–84.

²² See *infra* text accompanying notes 270–78.

²³ See *infra* text accompanying notes 279–327.

²⁴ See *infra* text accompanying notes 300–03.

²⁵ See *infra* text accompanying notes 331–35.

²⁶ In addition to Weber, *supra* note 15, the publications include Ronald D. Wenkart, *Attorneys Fees Under the IDEA and the Demise of the Catalyst Theory*, 165 EDUC. L. REP. 439, 445 (2002), which predicts that courts will apply *Buckhannon* to special education cases, and Jennifer R. Rowe, Note, *Implications of Buckhannon Board and Care Home, Incorporated v. West Virginia Department of Health and Human Resources for Due Process Under the Individuals with Disabilities Education Act*, 2002 BYU EDUC. & L.J. 333, a student piece appearing in the same law review issue as my article, which describes the case and special education dispute procedures and concludes “that the Court’s decision in *Buckhannon* will result in fewer out of court settlements and increased litigation for American school districts under IDEA.” *Id.* at 334.

²⁷ See, e.g., Paolo G. Annino, *The Buckhannon Decision: The End of the Catalyst Theory and a Setback to Civil Rights*, 26 MENTAL & PHYSICAL DISABILITY L. REP., Jan.–Jun. 2002 at 11; Adam Babich, *Fee Shifting After Buckhannon*, 32 ENVTL. L. REP. 10,137 (2002); Marilyn

the catalyst theory.²⁸ This Article seeks to expand the scholarly discussion by coming to grips with the post-*Buckhannon* cases and their arguments regarding the extension or restriction of the case, by suggesting some additional considerations relevant to *Buckhannon*'s application to special education cases, by giving thorough consideration to strategic implications of the end of the catalyst rule, and by beginning a discussion about legislative reform.

Part II of this Article discusses the catalyst theory and the *Buckhannon* holding. Part III gives background on IDEA and its attorneys' fees provision. Part IV describes cases extending *Buckhannon* to special education disputes. Part

A. Mahusky et al., *Erosion of Civil Rights Enforcement: Judicial Constriction of the Civil Rights and Disability Law Bar*, 28 VT. B.J., June 2002 at 41; Marisa L. Ugalde, *The Future of Environmental Citizen Suits after Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health & Human Resources*, 8 ENVTL. LAW. 589 (2002); Caroline L. Curry, *Attorney's Fees—"Prevailing Party" and Rejection of the "Catalyst Theory,"* 54 ARK. L. REV. 727, 727-30 (2001); Kyle A. Loring, Note, *The Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation*, 43 B.C. L. REV. 973 (2002); Macon Dandridge Miller, Comment, *Catalysts as Prevailing Parties under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347 (2002); Leading Cases, 115 HARV. L. REV. 457 (2001). Some of the sources are purely descriptive, but those that take a position on the case are generally critical of it. See, e.g., Annino, *supra*, at 13 ("[T]he *Buckhannon* decision discourages the enforcement of civil rights."); Mahusky, *supra*, at 41 ("*Buckhannon* stands as fundamentally inconsistent with the Congressional [sic] premise that private enforcement actions are an essential component of the vindication of individuals' civil rights."); Loring, *supra*, at 974 ("Until the catalyst theory is reinstated, or an adequate substitute created, public and private actors will continue to violate the rights of those citizens least able to defend themselves."); see also David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 243 (2003) ("*Buckhannon* . . . creates another silencing doctrine by discouraging plaintiffs [sic] lawyers from litigating expensive suits that previously held the allure of recouping costs through fee shifting."); Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 725 (2002) ("If there were a contest for the most preposterous decision of the Term, *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* surely ranks near the top.") (footnote omitted).

²⁸ Articles about the catalyst theory in general include: Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 VA. L. REV. 1429 (1994); Martin Patrick Averill, Comment, "*Specters*" and "*Litigious Fog*"?: the Fourth Circuit Abandons Catalyst Theory in S-1 & S-2 by and through P-1 & P-2 v. State Board of Education of North Carolina, 73 N.C. L. REV. 2245 (1995). Scholarship regarding special education attorneys' fees in general includes: MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE ch. 23 (2d ed. 2002) (discussing attorneys' fees in special education cases); Thomas F. Guernsey, *The School Pays the Piper, But How Much? Attorneys' Fees in Special Education Cases After the Handicapped Children's Protection Act of 1986*, 23 WAKE FOREST L. REV. 237 (1988); Peter C. Hughes, *Attorneys' Fees for Administrative Proceedings Under the HCPA and Contingency Enhancements*, 58 GEO. WASH. L. REV. 909 (1990); Sheila K. Hyatt, *The Remedies Gap: Compensation and Implementation Under the Education for All Handicapped Children Act*, 17 N.Y.U. REV. L. & SOC. CHANGE 689, 728-31 (1990); Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: Of Carey, Crest Street and Congressional Intent*, 60 TEMP. L.Q. 599, 639-50 (1987).

V discusses cases that decline to extend *Buckhannon* to IDEA and other cases relevant to the refusal to make the extension. This Part considers arguments that *Buckhannon* should not apply to IDEA at all (Part V.A), that it should not apply to various means by which IDEA cases settle (Part V.B), that post-*Buckhannon* policies of refusing to include fees in settlements violate IDEA (Part V.C), and that other non-IDEA provisions may supply a basis for fee awards (Part V.D). Part VI takes up litigation strategies that parents and school districts are likely to use as *Buckhannon* is applied to special education cases. Part VII considers federal and state legislative reform.

II. THE CATALYST THEORY AND THE *BUCKHANNON* DECISION

The background to the issue of *Buckhannon*'s applicability to special education cases is largely that of *Buckhannon* itself: the catalyst theory that it overturned and the reasoning and language the opinion employed.

A. *The Catalyst Theory*

For about a quarter of a century, the courts held that claimants could recover attorneys' fees under federal civil rights fees laws when they prevailed in achieving what they had sought in the litigation, even if the case itself ended in dismissal for mootness, voluntary dismissal, or another disposition that did not entail a final judgment in favor of the claimant. The theory was that claimants prevail when the litigation is the "catalyst" for a change that provides the relief. Beginning no more than two years after passage of the principal federal civil rights fees law, the 1976 Civil Rights Attorney's Fees Awards Act,²⁹ courts adopted the catalyst theory³⁰ on the strength of multiple passages in the Act's legislative history endorsing the idea that a formal judgment need not be obtained for fees to be awarded.³¹ By 1987, the Supreme Court was able to declare accurately that it was settled law that fees were available if the litigation

²⁹ 42 U.S.C. § 1988 (2000).

³⁰ See, e.g., *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978). Justice Ginsburg's dissent in *Buckhannon* cites twelve other court of appeals decisions predating the Supreme Court's *Hewitt v. Helms* decision, 482 U.S. 755, 760 (1987), which unsurprisingly described the catalyst theory as "settled law." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 626 & n.4 (2001) (Ginsburg, J., dissenting). The only circuit not to adopt the catalyst theory was the Federal Circuit, which did not have the opportunity to consider the issue. *Id.* at 625.

³¹ See, e.g., H.R. REP. NO. 94-1558, at 7 (1976) ("[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed."); S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912 ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.") (citation omitted).

vindicated the claimant's civil rights, even in the absence of a judgment in the claimant's favor.³²

In 1994, however, the Fourth Circuit Court of Appeals ruled in *S-1 & S-2 by & through P-1 & P-2 v. State Board of Education*³³ that the catalyst theory clashed with the Supreme Court's 1992 decision *Farrar v. Hobby*.³⁴ *Farrar* had determined that a modest success on one of twenty claims did not make the plaintiff a prevailing party under the Civil Rights Attorneys' Fees Act.³⁵ All the other courts of appeals that considered the matter declined to follow *S-1* and instead reaffirmed the catalyst theory, saying that *Farrar* was entirely irrelevant to the catalyst theory's continued validity.³⁶

B. Buckhannon

Buckhannon Board and Care Home operated assisted living residences in West Virginia, but the West Virginia State Fire Marshal ordered the organization to shut down its facilities because some of its residents were too disabled to reach an emergency exit without assistance in case of a fire.³⁷ Buckhannon argued that its personnel could give the residents any help they needed to evacuate, and that failure to modify the state licensing rule constituted disability discrimination.³⁸ Joining with a 102-year-old resident, Buckhannon sued the state under the Fair Housing Act Amendments (FHAA) of 1988³⁹ and the Americans with Disabilities Act (ADA) of 1990.⁴⁰ The court granted a temporary restraining order against enforcement of the provision, then entered an interim agreed order

³² *Hewitt v. Helms*, 482 U.S. 755, 760, 763 (1987) (describing entitlement to fees as "settled law" in situations where "voluntary action by the defendant . . . affords the plaintiff all or some of the relief he sought," and reserving the question of when catalyst theory justifies a fee award); see also *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (also recognizing this rule).

³³ 21 F.3d 49 (4th Cir. 1994) (en banc).

³⁴ 506 U.S. 103 (1992).

³⁵ *Id.* at 116.

³⁶ *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577 & n.2 (1st Cir. 1999); *Morris v. City of W. Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Little Rock Sch. Dist. v. Pulaski City Sch. Dist.*, No. 1, 17 F.3d 260, 263 n.2 (8th Cir. 1994). The Supreme Court majority opinion vindicated those courts in some measure by noting that *Farrar* is irrelevant to the catalyst theory's validity. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.5 (2001).

³⁷ *Buckhannon*, 532 U.S. at 600.

³⁸ See *id.* at 600-01.

³⁹ 42 U.S.C. §§ 3601-3607 (2000).

⁴⁰ *Id.* §§ 12,101-213 (2000).

to the same effect.⁴¹ Plaintiffs voluntarily dismissed their damages claims when the state raised a sovereign immunity defense,⁴² but the court denied the state's motion to dismiss the plaintiffs' claim for permanent injunctive relief.⁴³ Then, less than a month after defeat of the state's motion, the state legislature repealed the rule Buckhannon had challenged.⁴⁴ The state moved to dismiss the case as moot and the court granted the motion, though it imposed monetary sanctions on the state for multiplying plaintiffs' expenses by not telling them about the plan to repeal the rule.⁴⁵ After dismissal, the plaintiffs moved for attorneys' fees, asserting that the suit motivated the legislature to change the rule. The court denied the motion, for it was bound by the decision of the Fourth Circuit in *S-1* rejecting the catalyst theory and making fees available only when there is a judgment, consent decree, or settlement.⁴⁶ The court of appeals affirmed, and the Supreme Court granted certiorari.⁴⁷

The Supreme Court affirmed. Chief Justice Rehnquist's opinion reasoned that under the relevant attorneys' fees statutes, fees are available only to a civil rights claimant who is a "prevailing" party, and that the term prevailing party means one who has been awarded some relief by the court.⁴⁸ The Court cited a legal dictionary and some of the language used in earlier cases to establish the definition.⁴⁹ It granted that a plaintiff who obtains relief by a consent decree is entitled to fees, but declared that in that situation the plaintiff has achieved a judicially ordered change in the legal relationship between the parties.⁵⁰ Obtaining success without a judicial sanction is not the same thing.⁵¹ The Court found the language in earlier cases approving the catalyst theory unpersuasive and similarly rejected language in the legislative history of the Civil Rights Attorney's Fees Awards Act.⁵² Turning to questions of policy, the Court doubted assertions by the plaintiffs that in the absence of the catalyst rule defendants would intentionally moot cases to avoid fees and hence diminish the incentives to file civil rights litigation.⁵³ The Court said that no empirical evidence had emerged

⁴¹ *Buckhannon*, 532 U.S. at 624 (Ginsburg, J., dissenting).

⁴² *See id.* at 601 n.1 (majority op.).

⁴³ *Id.* at 624 (Ginsburg, J., dissenting).

⁴⁴ *Id.*

⁴⁵ *Id.* at 601 & n.2 (majority op.).

⁴⁶ *Id.* at 602.

⁴⁷ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001).

⁴⁸ *Id.* at 602–03.

⁴⁹ *Id.* at 603 & n.5.

⁵⁰ *Id.* at 604.

⁵¹ *See id.*

⁵² *Id.* at 605–08.

⁵³ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532

from the Fourth Circuit to support that forecast, and it weighed the potential harm against the possibility that fear of fees may keep some defendants from settling cases.⁵⁴ Justice Scalia wrote a concurrence, joined by Justice Thomas, commenting on the meaning of “prevailing” and warning about the risk of settlements “extorted” by the fear of fees awards.⁵⁵

Justice Ginsburg dissented, with Justices Stevens, Souter, and Breyer.⁵⁶ She noted the decades of precedent from the circuit courts supporting the catalyst theory, and said that under the ordinary understanding of the term and previous Supreme Court precedent, “prevailing” means getting what the party sought, even without a judgment.⁵⁷ She argued that the legislative history was “hardly ambiguous,” and instead clearly showed the congressional understanding that the term “prevailing” had to be interpreted to include prevailing as a catalyst for the change.⁵⁸ She also challenged the majority’s policy arguments, arguing that the catalyst rule does not cause defendants to resist changing their ways in order to avoid fees awards; instead, the catalyst rule creates an incentive for defendants to change their ways immediately so as to avoid accruing additional fees liability.⁵⁹ As for the administrability of the catalyst rule, Justice Ginsburg argued that the factual determination whether the lawsuit motivated the change is no harder than other determinations of motive.⁶⁰ She said that the district courts would safeguard against awarding fees in cases without enough merit to make the defendant change its policies to avoid an unfavorable decision on the merits.⁶¹

The majority may be right that a dictionary definition of the term “prevailing party” would not necessarily include those who prevail without judicial approval of the result. The opinion is on much shakier ground in disregarding the

U.S. 598, 608 (2001).

⁵⁴ *Id.* The Court also noted the limits on mootness doctrine and the desirability of avoiding satellite litigation over fees. *Id.* at 609.

⁵⁵ *Id.* at 610–20 (Scalia, J., concurring). Justice Scalia further disparaged the post-*S-I* circuit court cases as instances in which the Supreme Court’s dicta had misled the courts. *Id.* at 621–22.

⁵⁶ *Id.* at 622 (Ginsburg, J., dissenting).

⁵⁷ *Id.* at 625–28. She also relied on a Supreme Court case, *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884), in which a cost award, which would be available only to a prevailing party, was given to a party that did not succeed in court. *See Buckhammon*, 532 U.S. at 630–31 (Ginsburg, J., dissenting). The majority distinguished the case by stating that the Court must have used its discretion to award costs to the party that did not prevail on account of the “legally successful whipsawing tactics” of its opponent. *Id.* at 606 n.8 (majority op.). Justice Ginsburg further supported her practical definition of the term with treatises and state cases regarding costs. *Id.* at 631–33 & nn.6–8 (Ginsburg, J., dissenting).

⁵⁸ *Id.* at 636–38.

⁵⁹ *Id.* at 639.

⁶⁰ *Id.* at 639–40.

⁶¹ *Id.* at 640.

legislative history that gives meaning to the potentially ambiguous legislative term.⁶² However, even if the Court were correct with regard to the proper meaning of the term “prevailing” when the Civil Rights Attorney’s Fees Awards Act was passed in 1976, the Court failed even to address the argument that by the time Congress used the same language in the 1988 FHAA and 1990 ADA,⁶³ the words had a universally recognized construction that included a party who prevails because the suit is a catalyst for voluntary change.⁶⁴ The cases were so many and so clear that in 1985 Senators Strom Thurmond and Orrin Hatch tried unsuccessfully to amend the 1976 Act to change the construction, recognizing in their comments to the Senate that the language had the catalyst gloss and the gloss could be changed only by legislative amendment.⁶⁵ Thus the meaning of the term

⁶² If the Court had taken seriously the legislative history behind the term, it would have concluded that those who prevail without adjudication or consent decrees are included. *See* H.R. REP. NO. 94-1558, at 7 (1976) (“[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.”); *see also* S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (“[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.”). The Court’s decision is accurately characterized as “a recent example of the Supreme Court’s mounting disregard for legislative history.” Mary D. Fan, Case Note, 111 YALE L.J. 1251, 1252 (2002). Justice Scalia has frequently questioned the wisdom of relying on legislative history. *See, e.g., Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996). There the Court said:

[I]t is a fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of those Senators and Members of the House who voted for the final version of the . . . Act, and the President who signed it, were, when they took those actions, aware of the drafting evolution that the Court describes; and if they were, that their actions in voting for or signing the final bill show that they had the same ‘intent’

Id. Nevertheless, the majority of the Court continues to use legislative history as an interpretive tool. *See, e.g., Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748, 759 & nn.10–11 (2003) (relying on legislative history to interpret provision of Coal Industry Retiree Health Benefit Act). Even Justice Scalia has joined an opinion that relies heavily on legislative history to determine congressional intent. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146–49 (2000) (discussing legislative history regarding tobacco legislation). Many scholars have challenged Justice Scalia’s approach to statutory interpretation. *See, e.g., Abner J. Mikva & Eric Lane, The Muzak of Justice Scalia’s Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121 (2000).

⁶³ These were the laws at issue in *Buckhannon*. *Buckhannon*, 532 U.S. at 600.

⁶⁴ I have made this argument previously. Weber, *supra* note 15, at 280–81 (discussing congressional acquiescence argument and support for it).

⁶⁵ *See* 131 CONG. REC. S22356 (1985). Senator Hatch remarked:

Due to the protracted nature of some litigation, a claim may be rendered moot by State or Federal legislation enacted prior to judicial resolution of the conflict. Under existing case law such a turn of events would not preclude a

"prevailing party" at least in the statutes at issue in *Buckhannon*, the FHAA and the ADA, included those who prevail because their claims were catalysts. The Court stumbled in failing to meet the congressional acquiescence argument. Nevertheless, *Buckhannon* has been unleashed, and the Court is unlikely to call it back. The question at this point is its reach rather than its validity.

III. ATTORNEYS' FEES IN SPECIAL EDUCATION CASES UNDER IDEA

Unlike the litigation in *Buckhannon*, special education cases are subject to a mandatory administrative process, which resolves the bulk of disputes. Since 1986, federal law has made fees available to parents who prevail in any special education proceedings, either administrative or judicial.

A. IDEA and "Due Process" Procedure

The Individuals with Disabilities Education Act guarantees free, appropriate public education to all children of school age who have disabilities. Congress passed the legal guarantee in 1975, after determining that approximately 1.75 million children with disabilities were totally excluded from school and 2.5 million were in programs that were not appropriate to meet their educational needs.⁶⁶ Free, appropriate public education includes special education and related services that provide an appropriate pre-school, elementary, or secondary school education in accordance with an individualized education program for each child.⁶⁷

The special education law's supporters intended to bring children with disabilities into the mainstream, to end what one of the law's sponsors described as their double invisibility: their being locked away out of sight and, when seen, their being taken more as manifestations of disabling conditions than as human beings. Senator Stafford declared: "As much as any other action of the Congress in the two hundred years of the Republic, the . . . Act represents a gallant and determined effort to terminate the two-tiered invisibility once and for all with respect to exceptional children in the Nation's school systems."⁶⁸

This law was a radical departure from the status quo of exclusion and neglect.⁶⁹ Remarkably, over more than twenty-five years, the law's primary goal

recovery of attorneys' fees where a court determined that the case was a catalyst for the legislative change.

Id.

⁶⁶ H.R. REP. NO. 94-332, at 11 (1975).

⁶⁷ 20 U.S.C. § 1401(8) (2000).

⁶⁸ Robert Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72 (1978).

⁶⁹ See Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A*

has been met. Though problems remain with the treatment of children with disabilities in many public school settings,⁷⁰ a recent assessment accurately concluded:

Over the years, what has become known as the Individuals with Disabilities Education Act (IDEA) has moved children with disabilities from institutions into classrooms, from the outskirts of society to the center of class instruction. Children who were once ignored are now protected by the law and given unprecedented access to a “free appropriate public education.”⁷¹

One of the central innovations of the special education law, and a key to its success, is that it empowers parents to participate in designing programs for their children and to challenge school district decisions about educational services and placement. IDEA provides that parents must receive notice of programs and placements, and may invoke an administrative hearing procedure, redundantly called the “due process” hearing process, to challenge decisions with which they disagree.⁷² For most cases, the process is mandatory; if the parent does not exhaust due process hearing procedures, the court will dismiss her claims that the child’s right to a free, appropriate public education has been infringed.⁷³

The hearing has many of the characteristics of a civil trial. The parent is entitled to be heard by an impartial fact finder,⁷⁴ to receive records and other evidence before the hearing,⁷⁵ to bring counsel or other advisors,⁷⁶ to present evidence,⁷⁷ to cross-examine witnesses,⁷⁸ to compel the attendance of witnesses,⁷⁹ and to receive a written decision with findings of fact.⁸⁰ The record

Study in the Interpretation of Radical Statutes, 24 U.C. DAVIS L. REV. 349, 364–66 (1990) (stressing intentions of law’s supporters to transform society for children with disabilities).

⁷⁰ See Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079 (2002) (discussing remedies for teacher and peer harassment of schoolchildren on the basis of disability).

⁷¹ PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUC. FOR CHILDREN AND THEIR FAMILIES 3 (2002). The Report goes on to discuss various criticisms of the law and suggests measures for reform.

⁷² 20 U.S.C. § 1415(f) (2000).

⁷³ See, e.g., *Rose v. Yeaw*, 214 F.3d 206, 212 (1st Cir. 2000) (requiring exhaustion); *Doe v. Ariz. Dep’t of Educ.*, 111 F.3d 678, 685 (9th Cir. 1997) (same); *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (same).

⁷⁴ See 20 U.S.C. § 1415(f)(3) (2000).

⁷⁵ *Id.* § 1415(f)(2) (2000).

⁷⁶ *Id.* § 1415(h)(1) (2000).

⁷⁷ *Id.* § 1415(h)(2) (2000).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 20 U.S.C. § 1415(h)(4) (2000).

of the hearing becomes the basis for appeals to court,⁸¹ and the judge in a court proceeding is to give due weight to the findings of the hearing officer.⁸² Due process hearing officers have the power to order new placements and programs for children, or to overturn a decision by a school district to change a placement or program.⁸³ They may also order reimbursement of tuition or costs of services that the parents were wrongly forced to incur,⁸⁴ and they may compel school districts to provide compensatory education when appropriate services were wrongly denied.⁸⁵

B. Fees in Special Education Cases Under IDEA

The fees provision that relates to this special education due process procedure originated in 1986, with the Handicapped Children's Protection Act.⁸⁶ The Act overturned the Supreme Court's decision *Smith v. Robinson*,⁸⁷ which had held that prevailing parents could not obtain fees in court actions in special education cases under a theory combining *Hagans v. Lavine*⁸⁸ and *Maher v. Gagne*.⁸⁹ Under that theory, parents sought to obtain fees by joining the special education law claim with constitutional claims under 42 U.S.C. § 1983, for which attorneys' fees were available under 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Act of 1976. The parents would then prevail on the special education law claim and assert entitlement to fees on the ground that they could have prevailed on the

⁸¹ See *id.* § 1415(i)(2)(B)(i) (2000) (providing for court's receipt of record). The court, however, may hear additional evidence. See *id.* § 1415(i)(2)(b)(ii) (2000).

⁸² Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

⁸³ These services may be quite elaborate and extensive. See, e.g., Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 70, 79 (1999) (affirming hearing officer decision to require school district to provide respiratory care and other services to ventilator-dependent child with quadriplegia).

⁸⁴ Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 363, 374 (1985) (affirming hearing officer's decision to grant tuition reimbursement when parents placed child in private school).

⁸⁵ E.g., Burr v. Ambach, 863 F.2d 1071, 1078-79 (2d Cir. 1988), *vacated sub nom.*, Sobol v. Burr, 492 U.S. 902 (1989), *reaff'd*, 888 F.2d 258 (2d Cir. 1989); see also WEBER, *supra* note 28, at 22:44 n.145 (collecting cases granting or affirming hearing officer grant of compensatory education).

⁸⁶ Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415(i)(3)(B)-(G) (2000)).

⁸⁷ 468 U.S. 992, 1021 (1984) (barring attorneys' fees in special education case).

⁸⁸ 415 U.S. 528, 542-43 (1974) (approving extension of federal jurisdiction to decide case in favor of plaintiffs on statutory claim despite absence of independent jurisdictional basis for claim, when federal jurisdiction existed for colorable constitutional claim that court did not decide).

⁸⁹ 448 U.S. 122, 132-33 (1980) (approving grant of fees for success on claim brought under non-civil rights law when 42 U.S.C. § 1983 supplied claim for relief).

constitutional claim.⁹⁰ Despite the support that *Hagans* and *Maher* lent that approach, the *Smith* Court ruled that Congress intended the special education law to preempt the § 1983 and underlying equal protection claim on which the plaintiffs relied.⁹¹

The Handicapped Children's Protection Act overruled *Smith* and went beyond what the *Smith* plaintiffs had requested by providing for fees for any action or proceeding under the special education law. The "any action or proceeding" language made clear that the fees entitlement extends to administrative proceedings such as the due process hearing procedure.⁹² Over the years, Congress added provisions that call for attorneys' fees reductions or denials under an administrative offer of judgment procedure,⁹³ eliminate bonuses and multipliers,⁹⁴ and allow for denial or reduction of fees for disproportionate time spent⁹⁵ and for failure to give required information to the school district.⁹⁶ Congress also limited the instances in which fees may be available for attorney attendance at meetings of the school team that develops the educational program for a child with a disability.⁹⁷

Many special education cases settle, either informally or by a formal settlement agreement. In some cases, the parent files a due process complaint and the district, under the pressure of a scheduled hearing, takes another look at the child's educational program and provides the services or placement that the parents wanted or changes its plans to alter the child's services or placement. The parent withdraws the request or the hearing officer dismisses the case as moot. In other cases, the school district makes a due process hearing request to initiate an evaluation without the parent's consent, but withdraws the hearing request after it becomes clear that the parent will resist the move.⁹⁸ In still other cases, the

⁹⁰ The theory was successful in a number of lower court cases. *E.g.*, *Robert M. v. Benton*, 671 F.2d 1104, 1106 (8th Cir. 1982).

⁹¹ *Smith*, 468 U.S. at 1009–13. The Court also rejected a similar attempt to rely on the fees provision for cases brought under section 504 of the Rehabilitation Act of 1973. *Id.* at 1016–21. The Court left open the possibility that special education claimants could assert a due process violation pursuant to § 1983, for which fees would be appropriate; it held that no such claim was proper under the facts of the case. *Id.* at 1013–16.

⁹² 20 U.S.C. § 1415(i)(3)(B) (2000); *see, e.g.*, *Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell*, 940 F.2d 1280, 1285 (9th Cir. 1991) (allowing fees when settlement took place prior to due process hearing); *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188 (5th Cir. 1990) (same).

⁹³ 20 U.S.C. § 1415(i)(3)(D)(i) (2000).

⁹⁴ *Id.* § 1415(i)(3)(C) (2000).

⁹⁵ *Id.* § 1415(i)(3)(F)(i)–(iii) (2000).

⁹⁶ *Id.* § 1415(i)(3)(F)(iv) (2000).

⁹⁷ *Id.* § 1415(i)(3)(D)(ii) (2000) (providing that fees may not be awarded relating to any meeting of the IEP team not convened as result of due process hearing or judicial action).

⁹⁸ Thus prevailing parents need not be prevailing plaintiffs. *See Smith v. Roher*, 954 F.

parents demand a set of services or a placement, but then compromise their demands with the school district, and write up a formal settlement agreement. Frequently, these agreements emerge from state-run mediation, which IDEA requires state and local educational agencies to offer in special education disputes.⁹⁹ In some cases with formal settlement agreements, hearing officers make the agreement a part of the record or enter it as an agreed order, signed by the hearing officer. In other cases, they do not; the parties make a private agreement and the party that made the hearing request voluntarily dismisses it. Under the law prior to *Buckhannon*, the parent was entitled to fees in all those instances of informal or formal settlement as long as the hearing request was the catalyst for more than de minimis success in obtaining what she wanted from the district or keeping the district from doing something she did not want done.¹⁰⁰ Hearing officers in most states lack the power to award fees, but the parent could file suit in federal or state court¹⁰¹ to obtain a fees award from the school district, even without requesting any other relief.¹⁰²

IV. APPLYING *BUCKHANNON* TO DENY FEES TO PARENTS IN SPECIAL EDUCATION CASES

Buckhannon involved the attorneys' fees provisions in the ADA and FHAA, not in IDEA, the statute that establishes the rights at issue in most special education cases. Courts nonetheless might be expected to make the leap from

Supp. 359, 364 (D.D.C. 1997) (collecting authorities).

⁹⁹ See generally 20 U.S.C. § 1415(e)(1) (2000). It states:

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) ["the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"] to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested

Id.

¹⁰⁰ See, e.g., *Holmes v. Millcreek Township Sch. Dist.*, 205 F.3d 583, 594 (3d Cir. 2000) (awarding fees when dispute settled before hearing); *Beard v. Teska*, 31 F.3d 942, 951–53 (10th Cir. 1994) (explaining catalyst theory); *E.M. v. Millville Bd. of Educ.*, 849 F. Supp. 312, 314, 318 (D.N.J. 1994) (awarding fees when parent obtained objectives through mediation); WEBER, *supra* note 28, at 23:2–3 (collecting cases).

¹⁰¹ The statutory provision speaks in terms of federal jurisdiction, but, following ordinary approaches to construction of similar provisions, courts have found the jurisdiction to be concurrent. E.g., *W.R. v. Sch. Bd.*, 726 So. 2d 801, 804 (Fla. Dist. Ct. App. 1999). *Contra* *B.K. v. Norwalk Bd. of Educ.*, No. CV 980332503S, 29 Conn. L. Rptr. No. 10,394 (Conn. Super. Ct. Feb. 16, 2001).

¹⁰² See, e.g., *McSomebodies v. Burlingame Elementary Sch. Dist.*, 897 F.2d 974 (9th Cir. 1989) (establishing that action may be brought solely to obtain fees).

statute to statute and apply *Buckhannon* to special education disputes. Ordinarily, all civil rights attorneys' fees provisions are construed in a similar manner.¹⁰³ Moreover, the Fourth Circuit first departed from the catalyst theory in *S-1*, which was a special education attorneys' fees case.¹⁰⁴ *Buckhannon* rejected the reasoning of *S-1*, but enshrined its result. I previously predicted that courts generally would apply *Buckhannon* to special education cases,¹⁰⁵ and indeed they have. Three federal appellate decisions suggest that *Buckhannon* applies broadly to special education cases, and many district court decisions concur. Judicial decisions in areas other than special education also point towards a widespread application of *Buckhannon*'s new rule.

The leading case at the present time is that of the Second Circuit Court of Appeals, *J.C. v. Regional School District 10*,¹⁰⁶ which overturned an award of fees in a case in which a hearing officer dismissed a due process hearing request as moot after the district made changes in the child's individualized education program (IEP)¹⁰⁷ and dropped expulsion proceedings against the child. The court had little difficulty concluding that *Buckhannon* barred fees. It declared that *Buckhannon* "expressly signaled its wider applicability" by referring to other fee-shifting laws and by noting that the standards used to interpret the term "prevailing party" are generally the same across the board.¹⁰⁸ In IDEA, Congress intended the term to have the same meaning, according to the special education law's legislative history,¹⁰⁹ and the courts had afforded the same construction to the language.¹¹⁰

The court rejected various distinctions offered by the parents in the case. The existence of an administrative process in IDEA fails to distinguish the statute from the ADA, which was at issue in *Buckhannon* and also has an administrative

¹⁰³ See *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Warner v. Indep. Sch. Dist. No. 625*, 134 F.3d 1333, 1336-37 (8th Cir. 1998) (comparing attorney fees claim under IDEA to § 1988 claim).

¹⁰⁴ See *S-1 & S-2 by & through P-1 & P-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (en banc).

¹⁰⁵ Weber, *supra* note 15, at 279.

¹⁰⁶ 278 F.3d 119 (2d Cir. 2002).

¹⁰⁷ An IEP is a written plan that includes, among other things, the child's current levels of educational performance, measurable annual goals and short-term objectives, a statement of the special education and related services to be provided the child, and an explanation of the extent to which the child is to participate with nondisabled children in regular class. 20 U.S.C. § 1414(d)(1)(A) (2000). The school district must have in place an IEP for every child who receives special education services, § 1414(d)(2)(A), and must review the IEP at least annually, § 1414(d)(4)(A)(i).

¹⁰⁸ *J.C.*, 278 F.3d at 123-24.

¹⁰⁹ *Id.* at 124 (citing S. REP. NO. 99-112, at 13 (1986)).

¹¹⁰ *Id.*

process.¹¹¹ The court viewed the IDEA goal of early resolution of controversies as insufficient to take the case out of the rule of *Buckhannon*, which had rejected similar policy arguments in discussing the statutes at issue there.¹¹² It found IDEA's general denial of attorneys' fees for participation in IEP meetings to be inconsistent with awarding fees for informal settlements.¹¹³ Finally, the court rejected the argument that an IEP has the nature of a judicial consent decree and changes the legal relationship of the parties. Although IDEA requires districts to develop and enforce IEPs, that statutory mandate differs from one sanctioned by a court, and *Buckhannon* requires a judicial sanction.¹¹⁴

*John T. v. Delaware County Intermediate Unit*¹¹⁵ joins *J.C.* as a second court of appeals decision ruling that *Buckhannon* forbids fees in an IDEA case settlement. The parents in that case had obtained a preliminary injunction requiring that special education and related services be provided their child at the child's private school; then, after extensive administrative proceedings, the parents agreed to the child's placement in a public school, but with an IEP different from what the public school had previously proposed.¹¹⁶ "Having thereby achieved the primary objective of his litigation before the District Court, *i.e.*, obtaining a satisfactory IEP, John T. moved for voluntary dismissal of his Complaint"¹¹⁷ The court of appeals affirmed denial of John T.'s motion for attorneys' fees, holding that *Buckhannon* applied to IDEA.¹¹⁸ The court rejected the arguments that the explicit coverage of settlement offers in the IDEA fees provision and IDEA's general policy in favor of amicable resolution take IDEA outside *Buckhannon*.¹¹⁹ It further ruled that the injunction, and even a contempt finding occasioned by the district's failure to comply, did not make the plaintiffs prevailing parties under *Buckhannon*.¹²⁰

¹¹¹ *Id.* The court failed to note that the administrative process is applicable only to employment claims under title I of the ADA, not claims under title II, the provision governing *Buckhannon*. See generally Mark C. Weber, *Disability Discrimination by State and Local Government. The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1104-09 (1995) (discussing exhaustion of administrative remedies in ADA title II claims).

¹¹² *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 124 (2d Cir. 2002).

¹¹³ *Id.* at 124-25. Fees are not available for participation in IEP meetings unless the meetings were convened as a result of administrative or judicial action. 20 U.S.C. § 1415(i)(3)(D)(ii) (2000).

¹¹⁴ *J.C.*, 278 F.3d at 125.

¹¹⁵ 318 F.3d 545 (3d Cir. 2003).

¹¹⁶ *Id.* at 549-51.

¹¹⁷ *Id.* at 551.

¹¹⁸ *Id.* at 556-57.

¹¹⁹ *Id.* at 557-58.

¹²⁰ *Id.* at 558-60. The court affirmed the contempt order. *Id.* at 552.

Most recently, in *T.D. v. LaGrange School District No. 102*,¹²¹ the Seventh Circuit ruled that *Buckhannon* applies to IDEA; accordingly, the court overturned a portion of a fees award in a special education case. The parents of a child with multiple disabilities disputed the scope of services the school system offered and sought reimbursement for services they themselves had provided.¹²² A hearing officer decision awarded limited reimbursement and various prospective relief, but denied reimbursement for a private day school's tuition.¹²³ The parents filed a judicial appeal, and a courthouse-steps settlement earned them full reimbursement for the private day school's costs.¹²⁴ The district court awarded fees, but the court of appeals reversed. Like *J.C.* and *John T.*, *T.D.* stressed the consistency of interpretation of the fee-shifting statutes.¹²⁵ It dismissed the significance of the "somewhat more complex" text and structure of the IDEA fee provision.¹²⁶ The court rejected policy arguments based on the importance of settlement in the context of special education disputes.¹²⁷

Many district court cases play variations on the themes of *J.C.*, *John T.*, and *T.D.* The court in *Jose Luis R. v. Joliet Township High Sch. Dist. 204*¹²⁸ repeated *J.C.*'s point about the breadth of the language in *Buckhannon*, and went on to deny fees when a settlement agreement reached at mediation was read into the record at hearing, accompanied by withdrawal of the hearing request.¹²⁹ Citing *Buckhannon* and a non-special education court of appeals case reading that precedent broadly,¹³⁰ *Alegria v. District of Columbia*¹³¹ barred fees awards on a group of settled cases, though it questioned in a footnote whether *Buckhannon* ought to apply to the situation of education of children with disabilities, a context

¹²¹ 349 F.3d 469 (7th Cir. 2003). The district court opinion in the case, which identifies the plaintiff as "TD," is discussed *infra* text accompanying notes 142–46.

¹²² *Id.* at 472–73.

¹²³ *Id.* at 473. The court affirmed the award of fees for the success before the hearing officer. *Id.* at 480.

¹²⁴ *Id.* at 473.

¹²⁵ *Id.* at 474–75.

¹²⁶ *Id.* at 475–76.

¹²⁷ *Id.* at 476–78.

¹²⁸ No. 01 C 4798, 2002 WL 54544 (N.D. Ill. Jan. 15, 2002) (denying fees for settlement agreement reached at mediation following hearing request, when agreement had been read into record before hearing officer without statement of approval by hearing officer).

¹²⁹ *Id.* at *1; see also *Koswenda v. Flossmoor Sch. Dist. No. 161*, 227 F. Supp. 2d 979 (N.D. Ill. 2002) (magistrate judge opinion) (endorsing approach of *J.C. v. Regional Sch. Dist. 10* and finding *Buckhannon* applicable to IDEA, but holding that parents were prevailing parties when they achieved success by hearing officer decision, even though they did not win on some major issues).

¹³⁰ *Oil, Chem., and Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002).

¹³¹ No. 00-2582 (GK), 2002 U.S. Dist LEXIS 16898 (D.D.C. Sept. 6, 2002).

in which the swift passage of a child's development places an overwhelming premium on rapid administrative settlement of disputes.¹³² Courts have also applied *Buckhannon* to bar fees in special education cases when the voluntary action of the defendant or changes in circumstances rendered the case moot or led the parents to withdraw the claim.¹³³ In *Christina A. v. Bloomberg*,¹³⁴ the Eighth Circuit Court of Appeals overturned a fees award for the plaintiff's class action settlement agreement guaranteeing special education services for juvenile inmates in a correctional facility.¹³⁵ The court ruled that the disposition of the case, a dismissal without prejudice and retention of district court jurisdiction, was not sufficiently similar to a consent decree to support a fees award,¹³⁶ and that the approval of the class action settlement did not constitute a judicial imprimatur on the agreement.¹³⁷

The courts have not singled out IDEA in extending *Buckhannon*'s rule. Unsurprisingly, the case has been used to deny fees in cases governed by the original Civil Rights Attorneys' Fees Act¹³⁸ and the fees provision of the

¹³² *Id.* at *5 n.1; see also *Akinseye v. District of Columbia*, 193 F. Supp. 2d 134 (D.D.C. 2002) (denying interest on previous fee awards for settlements on basis of *Buckhannon*, but expressing reservations about wisdom of applying *Buckhannon* to IDEA administrative proceedings), *rev'd on other grounds*, 339 F.3d 970 (D.C. Cir. 2003).

¹³³ *Doe v. Boston Pub. Schs.*, 264 F. Supp. 2d 65 (D. Mass. 2003) (denying fees when new IEP offered and signed at hearing); *Matthew V. ex rel. Craig V. v. Dekalb County Sch. Sys.*, 244 F. Supp. 2d 1331 (N.D. Ga. 2003) (denying fees when voluntary payment to parents mooted case but administrative law judge decided case anyway); *J.S. v. Ramapo Cent. Sch. Dist.*, 165 F. Supp. 2d 570 (S.D.N.Y. 2001) (denying fees when defendant paid child's tuition at private school and reimbursed parents and parents did not pursue due process hearing request to resolution); *Baer v. Klagholz*, 786 A.2d 907 (N.J. Super. Ct. 2001) (denying fees for hours spent challenging regulations that defendant ultimately amended without court order or consent judgment); see *E.C. v. Bd. of Educ.*, 792 A.2d 583 (N.J. Super. Ct. 2001) (denying fees when parents abandoned mediation request and did not seek due process hearing). These cases are closer to the facts of *Buckhannon* than those that involve formal settlements. Nevertheless, they indicate a rejection of the contention that *Buckhannon* has no bearing on disputes under IDEA because of the special circumstances that surround special education cases. See generally *infra* text accompanying notes 142–69 (discussing sources that challenge *Buckhannon*'s application to IDEA cases).

¹³⁴ 315 F.3d 990 (8th Cir. 2003).

¹³⁵ The agreement covered other matters as well. See *id.* at 991.

¹³⁶ *Id.* at 993–94.

¹³⁷ *Id.* at 992. The dissent argued that the settlement was not merely a private one, and that it entailed the judicial oversight that *Buckhannon* deemed necessary to confer a judicial sanction. See *id.* at 996 (Melloy, J., dissenting).

¹³⁸ E.g., *New York State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 158 (2d Cir. 2001) ("Despite the fact that the holding in *Buckhannon* applied to the FHAA and ADA, it is clear that the Supreme Court intends the reasoning of the case to apply to § 1988 as well."); *Bennett v. Yoshina*, 259 F.3d 1097, 1100 (9th Cir. 2001) ("There can be no doubt that the Court's analysis in *Buckhannon* applies to

Freedom of Information Act,¹³⁹ as well as in cases in which the Equal Access to Justice Act (EAJA) applies.¹⁴⁰

V. GRANTING FEES TO PARENTS IN SPECIAL EDUCATION CASES DESPITE *BUCKHANNON*

Given the ease of the movement from ADA and FHAA fees to Civil Rights Attorneys Fees Act fees to IDEA fees, it may seem remarkable that many courts have continued to grant attorneys' fees in special education settlements. The cases are less of a man-bites-dog character than might be imagined, however. In some, courts have found distinctions between IDEA and the other statutes that justify different treatment for IDEA case settlements. These distinctions and other

statutes other than the two at issue in that case."); *Roberson v. Giuliani*, No. 99 CIV 10900 DLC, 2002 WL 253950, at *2 (S.D.N.Y. Feb. 21, 2002) (denying fees in food stamp benefits case settled by "Stipulation and Order of Discontinuance" in which plaintiffs withdrew claims but court retained jurisdiction over settlement for enforcement by any intended beneficiary of agreement), *rev'd*, 346 F.3d 75 (2d Cir. 2003); *see Johnson v. Rodriguez*, 260 F.3d 493 (5th Cir. 2001) (*per curiam*) (applying *Buckhannon* to civil rights case).

¹³⁹ *E.g.*, *Oil, Chem., and Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002) (denying fees in Freedom of Information Act and Government in the Sunshine Act case when parties entered into settlement agreement). *But see* David Arkush, Note, *Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of Buckhannon* *Board and Care Home v. West Virginia Dep't of Health and Human Resources*, 37 HARV. C.R.-C.L. L. REV. 131, 157 (2002) (questioning application of *Buckhannon* to FOIA cases).

¹⁴⁰ *E.g.*, *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) (denying fees), *cert. denied*, 123 S. Ct. 871 (2003); *Sileikis v. Perryman*, No. 01 C 944, 2001 U.S. Dist. LEXIS 12737 (N.D. Ill. Aug. 21, 2001) (same); *see also Sacco v. Dep't of Justice*, 317 F.3d 1384, 1386-87 (Fed. Cir. 2003) (applying *Brickwood* to deny fees in Merit Systems Protection Board case). *But see* Miller, *supra* note 27, at 1348 (contending that *Buckhannon* should not be applied to EAJA). Environmental statute fee provisions, which generally provide for fees when they are "appropriate" may merit different treatment than fee provisions with "prevailing party" language. *See Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002) (distinguishing *Buckhannon* in Endangered Species Act case); *see also Center for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) (distinguishing *Buckhannon* in Endangered Species Act case, noting that Act does not expressly require party seeking fees to be prevailing party, but denying fees on other grounds); Babich, *supra* note 27, at 10,140 ("The catalyst theory should remain viable under fee-shifting statutes that rely on the 'whenever appropriate' standard."); Philip Weinberg, *Environmental Law*, 52 SYRACUSE L. REV. 353, 358 (2002) ("The impact of *Buckhannon* on citizen suits under federal environmental statutes will likely be minimal."); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 166 (2002) ("Moreover, the Court's heavy reliance on the 'prevailing party' formulation in § 1988 means that, under the broader terms of the environmental statutes, *Buckhannon* need not bar fee awards for less than complete success or even where the plaintiff only precipitates non-judicially-sanctioned action.").

available ones carry significant persuasive power. In additional cases, courts have ruled that various kinds of settlements support fees in IDEA cases even though the agreements lack the precise form of consent decrees.¹⁴¹ One additional case has suggested that a school district's general policy of refusing to pay fees on settlements violates IDEA. Finally, there are bases for fees other than federal civil rights statutes, and these, of course, are unaffected by *Buckhannon*.

A. Refusing to Extend *Buckhannon* to Special Education Cases

One prominent district court decision has flatly refused to apply *Buckhannon* to the special education context. Various arguments it advances may have the strength to pull other courts in its direction, and some additional arguments it leaves aside may also prove persuasive.

1. *TD v. LaGrange School District*

In *TD v. LaGrange School District No. 102*,¹⁴² Judge Zagel of the Northern District of Illinois reasoned that IDEA, unlike the FHAA and ADA, has specific terms addressing settlement as a basis for awarding fees, such as the provision calling for a reduction in fees when parents reject settlement offers and receive less by litigating.¹⁴³ The court also noted that IDEA allows for attorneys' fees for mediations under some circumstances;¹⁴⁴ if mediation is successful it results in a settlement rather than a judicial or administrative decision. The law thus implies that attorneys' fees are appropriate for at least mediation-induced settlements. The court further relied on an *inclusio unius, exclusio alterius* argument. It pointed out that IDEA, unlike the other attorneys' fees laws, spells out the instances in which attorneys' fees are prohibited, but the IDEA provision nowhere excludes fees for settlement agreements.¹⁴⁵ Therefore, Congress manifested an intention to make settlement agreements eligible for fee awards.¹⁴⁶

These contentions merit discussion. The first argument is that IDEA's offer of judgment rule, which forbids post-settlement-offer fee awards in cases when

¹⁴¹ *Buckhannon*, of course, acknowledged that consent decrees support fee awards. *Buckhannon*, 532 U.S. at 604; see also *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989); *Maher v. Gagne*, 448 U.S. 122, 126-27 (1980).

¹⁴² 222 F. Supp. 2d 1062 (N.D. Ill. 2002) (finding *Buckhannon* inapplicable to IDEA cases, and granting parents fees for case that settled during pendency of district court proceedings, after hearing officer decision ruling partially in favor of parents but denying tuition reimbursement for private placement; noting that settlement granted partial tuition reimbursement), *aff'd in part and rev'd in part*, 349 F.3d 469 (7th Cir. 2003).

¹⁴³ *Id.* at 1065; see 20 U.S.C. § 1415(i)(3)(D) (2000).

¹⁴⁴ *TD*, 222 F. Supp. 2d at 1065; see 20 U.S.C. § 1415(i)(3)(D)(ii) (2000).

¹⁴⁵ *TD*, 222 F. Supp. 2d at 1065; see 20 U.S.C. § 1415(i)(3)(D)(ii) (2000).

¹⁴⁶ *TD*, 222 F. Supp. 2d at 1065.

the adjudicated result is not more favorable than the offer, implies the availability of fees on settlements. This contention is probably correct on its face. Whether it can survive *Buckhannon* is more doubtful, however. The special education regime that Congress put into place by statute looks very much like the general regime that the Supreme Court created judicially in *Marek v. Chesny*.¹⁴⁷ In a judicial proceeding, Civil Rights Attorneys' Fees Act fees accrued after an offer of judgment may be denied when the prevailing party rejects the offer and the litigated result is not more favorable than the offer.¹⁴⁸ If *Buckhannon* applies in that context, which it must if it is to have any meaning at all, it would appear to apply in IDEA cases.¹⁴⁹

TD's other arguments carry a great deal more weight. Congressional creation of a plan in which states can provide for parents to recover fees for mediations before due process hearing complaints are even filed certainly implies that fees on settlements are proper.¹⁵⁰ The purpose of mediation is to encourage settlement. The purpose of a state's allowing fees for mediation is to encourage mediation. It would be strange indeed if the only way in which the congressional and state intention of allowing fees on mediations to be accomplished would be if the parties voluntarily included the fees as part of the settlement agreement. In that instance, any dispute over the propriety or amount of fees would automatically derail the mediation, and the legislative decision to make fees available would defeat the goal that Congress and the state intended to encourage. A far more plausible interpretation is that Congress intended the parties to resolve their disputes over services for the child at mediation, and further intended parents who believe they prevailed to seek attorneys' fees from the courts while the school system implements the settlement agreement and provides services to the child. Under a contrary interpretation, the child becomes the victim as the parties dispute the fees and settlement is held up. Congress and the participating states could not have intended that result.

TD did not fully develop the position, but its argument regarding mediation supports a broader contention that a policy favoring rapid settlement of disputes on the merits applies with special force in IDEA cases and that adopting *Buckhannon*'s rule would frustrate that congressional policy. Congress

¹⁴⁷ 473 U.S. 1 (1985) (interpreting FED. R. CIV. P. 68 to bar award of § 1988 fees accrued after receipt of offer of judgment when rejected offer was more favorable than result in litigation).

¹⁴⁸ *Id.* at 10.

¹⁴⁹ The *John T.* court rejected this argument, reasoning that the definition of situations in which fees may be prohibited or reduced does not relate to the requirement that the parent prevail. *John T.*, 318 F.3d at 557. This counter-argument is correct as far as it goes, though it appears to reinforce the *inclusio unius* argument discussed below. See *infra* text accompanying notes 157–62.

¹⁵⁰ The state must elect this option for it to be effective. See 20 U.S.C. § 1415(i)(3)(D)(ii) (2000).

recognized the need for prompt dispute resolution by creating the mediation provisions and allowing states to induce parents to use them by allowing attorneys' fees for participation.

Although the *J.C.* court is correct in saying that statutory policies favor settlement in disputes involving the ADA and FHAA, the statutes whose fees provisions were at issue in *Buckhannon*,¹⁵¹ sometimes differences of degree are so great that they call for qualitatively different rules. The degree of urgency in resolving disputes over special education services is grave. When a school district provides inadequate special education services, the overriding priority of the parent must be to get adequate services in place as soon as possible. The due process hearing mechanism should provide prompt resolution of disputes, but the Supreme Court, observing the record of hearings under the special education laws, accurately characterized the process as "ponderous."¹⁵² The only way to get prompt relief is to enter into a settlement, either at mediation or independently after the filing of the due process complaint. One district court noted that denial of fees on settlements makes a reduction in the number of cases that reach early settlement "virtually inevitable."¹⁵³ Any obstacle to a quick resolution of special education cases is pernicious and frustrates congressional objectives of getting the services to the children who need them:

The sooner children receive special education services, the more likely it is that they will achieve the IDEA's goals. . . . As a former local court judge, this Court has seen first hand the inadequacy of education services provided to many children in the District of Columbia. And further, by the time some of these children ultimately receive needed services, valuable and irretrievable time has been lost as cases grind[] through the administrative process at an intolerably slow pace. The end result for many of these children is that they never develop to their full educational achievement level.¹⁵⁴

Another district judge added:

Settlement at the administrative level . . . is an absolutely essential component of the operation of the special education system. Speedy resolution of those cases is in the interest of all who are involved with that system. The goal is to provide

¹⁵¹ *J.C.*, 278 F.3d at 124.

¹⁵² Sch. Comm. of Town of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985) ("As this case so vividly demonstrates, . . . the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed.").

¹⁵³ *Akinseye v. District of Columbia*, 193 F. Supp. 2d 134, 139 (D.D.C. 2002) (denying interest on previous fee awards for settlements on basis of *Buckhannon*, but expressing reservations about wisdom of applying *Buckhannon* to IDEA administrative proceedings), *rev'd on other grounds*, 339 F.3d 970 (D.C. Cir. 2003).

¹⁵⁴ *Id.* at 140 (citations omitted).

disabled children, as early as possible in their difficult lives, with the full educational services to which they are entitled. If cases are litigated in court, rather than settled at the administrative level, access to those services is delayed for many months and, in some instances, years.¹⁵⁵

Denying fees for early settlement thus works at cross purposes to the underlying objective of IDEA.¹⁵⁶

The *TD* court's *inclusio unius* argument also carries persuasive force. The attorneys' fees provisions in the ADA and the FHAA, like the Civil Rights Attorneys' Fees Act of 1976, are one-sentence enactments that practically beg the courts to fill in their interstices.¹⁵⁷ The liberal courts of the era that immediately followed the 1976 Act interpreted it expansively in accordance with its legislative history, ruling, for example, that fees should be awarded to prevailing plaintiffs as a matter of course, and that settlements and dismissals merit fees when the plaintiffs achieve the objectives of the litigation. More politically conservative courts have in recent years read the law narrowly, ruling, for example, that offers of judgment may cut off fees liability,¹⁵⁸ that fees do not include expert witness costs¹⁵⁹ and, in *Buckhannon*, that settlements and dismissals do not merit fees

¹⁵⁵ *Alegria v. District of Columbia*, No. 00-2582 (GK), 2002 U.S. Dist. LEXIS 16898, at *5 (D.D.C. Sept. 6, 2002). For additional discussion of this case, see *supra* text accompanying notes 131–32.

¹⁵⁶ Of course, denying fees might keep some parents from prolonging the dispute by making the continued challenge a financial impossibility. In that instance, however, applying *Buckhannon* would appear to undermine the statutory goal of providing free special education to eligible children. Moreover, school districts may be expected to force the parents to trade services off against fee awards. See *infra* text accompanying notes 270–78. The Seventh Circuit declared itself “not persuaded” by any of the district court’s policy arguments, however. *T.D. v. LaGrange Sch. Dist.*, 349 F. 3d 469, 477 (7th Cir. 2003).

¹⁵⁷ See generally Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957) (discussing interstitial judicial lawmaking). Broad statutory language may be viewed as inviting courts to create a common law on the subject of the statute, as with the case of the Sherman Antitrust Act, 15 U.S.C. § 1 (2000). See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687–88 (1978); see also RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 754, 801 (4th ed. 1996) (discussing implied legislative delegation by means of broadly worded laws and explaining interstitial lawmaking).

¹⁵⁸ *Marek v. Chesny*, 473 U.S. 1 (1985) (holding that rejection of ultimately favorable FED. R. CIV. P. 68 offer of judgment limits fee award).

¹⁵⁹ *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 97 (1991). The Court in a footnote referenced legislative history supporting a contrary interpretation for the fees provision that pertains to IDEA. See *id.* at 91 n.5 (discussing H.R. CONF. REP. NO. 99-687, at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 1808). Most courts have followed the Court’s suggestion and permitted expert fees in IDEA actions. See, e.g., *P.G. v. Brick Township Bd. of Educ.*, 124 F. Supp. 2d 251 (D.N.J. 2000); *Mr. J. v. Bd. of Educ.*, 98 F. Supp. 2d 226 (D. Conn. 2000); *Bailey v. District of Columbia*, 839 F. Supp. 888 (D.D.C. 1993). But see *Neosho R-V Sch. Dist. v.*

even when the lawsuit achieved its end.

Unlike with the ADA and FHAA (or, for that matter, Civil Rights Attorneys' Fees Act) one-line fee entitlements, there is no basis for the courts to create a common law of fees denial under IDEA. The grounds on which fees may be denied or reduced are specified in the statute, and there is no call to add another one. The grounds include not just the administrative offer of judgment rule, but also a limit on when fees may be awarded for attendance at IEP meetings,¹⁶⁰ a reduction in fees for protracting proceedings and an exception to the reduction provision,¹⁶¹ and a reduction in fees for failing to provide specified information in the due process hearing request. The statute also contains a ban on bonuses and multipliers and the imposition of a local-community-rates standard.¹⁶²

The Seventh Circuit, in reversing Judge Zagel, argued that the elaborate IDEA provisions do not "clearly indicate a Congressional [sic] intent about anything related to the 'prevailing party' requirement."¹⁶³ What that contention misses is the significance of the elaborateness itself. The implication of the IDEA provision is that if Congress wanted to have courts add bases for denying fees, particularly one that contravenes the understanding of "prevailing party" that ruled the day when the IDEA provisions were adopted, it would have enacted a more open-ended provision, such as the ones found in the Civil Rights Attorneys Fees Act and the statutes in *Buckhannon*.

2. Additional Grounds on Which to Distinguish *Buckhannon*

Two arguments not developed by *TD* or the rest of the case law furnish additional distinctions between IDEA fees and those at issue in *Buckhannon* sufficient to take the case out of *Buckhannon*'s rule. The first is the fundamental point that IDEA exists to insure *free*, appropriate education for children with disabilities.¹⁶⁴ The entitlement to attorneys' fees and the congressional decision to rescue the entitlement from the Supreme Court's *Smith* decision reinforce the importance of the entitlement to special education free not just from tuition charges but also from the cost of attorneys' fees to obtain the special education. If the parent has to hire a lawyer to get services for the child, and the district confesses its fault and provides the services, the parent remains out of pocket for

Clark, 315 F.3d 1022 (8th Cir. 2003) (refusing to rely on legislative history). Congress overruled *Casey*'s interpretation of the Civil Rights Attorneys Fees Act in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071 (codified at 42 U.S.C. § 1988 (1994)).

¹⁶⁰ 20 U.S.C. § 1415(i)(3)(D)(ii) (2000).

¹⁶¹ *Id.* § 1415(i)(3)(F)-(G) (2000).

¹⁶² *Id.* § 1415(i)(3)(C) (2000).

¹⁶³ *T.D. v. LaGrange Sch. Dist.*, 349 F. 3d 469, 476 (7th Cir. 2003).

¹⁶⁴ 20 U.S.C. § 1401(8)(A) (2000). See generally Mark C. Weber, *The End of Responsible Relative Liability*, 54 EXCEPTIONAL CHILDREN 171 (1987) (discussing free education entitlement).

the fees. If *Buckhannon* bars fees in that case, the services to the child are anything but free. The fees statutes in *Buckhannon* were not attached to any entitlement to a free governmental service.¹⁶⁵

A second argument is that the denial of fees in IDEA cases creates a far more effective obstacle to the exercise of statutory rights to file an action in court than the denial of fees in the *Buckhannon* case statutes. If the individual who has an ADA or fair housing claim cannot find an attorney because of *Buckhannon*'s likely effect on the supply of legal services,¹⁶⁶ that person may file the action pro se. A number of courts, however, have held that the rights conferred by IDEA are those of the child, and that a parent who is not an attorney may not file an action on behalf of the child.¹⁶⁷ The child who is a minor may not file an action on behalf of herself,¹⁶⁸ so there is no way to file the action pro se. The *Buckhannon* rule thus has a much more significant (and doubtless unintended) consequence if applied to special education cases. Absence of fees for an attorney means no filing in court at all.¹⁶⁹

B. Finding Forms of Settlement that Support Fees Despite *Buckhannon*

Despite the strength of these arguments against applying *Buckhannon* to IDEA cases, many courts have made the application, and following *J.C.*, *John T.*, and other precedent, many more courts will. The question for those courts is what forms of settlement may support fees despite *Buckhannon*. *Buckhannon* itself

¹⁶⁵ A potential weakness of this argument is that in some situations, the Supreme Court has permitted some judicial obstacles to be erected against the provision of entitlements. Compare *Ortwein v. Schwab*, 410 U.S. 656 (1973) (permitting state to impose filing fee for action to challenge welfare benefits reduction), with *Boddie v. Connecticut*, 401 U.S. 371 (1971) (requiring waiver of filing fee for indigent's divorce action). In no situation, however, has the Court allowed a service that Congress has required to be cost-free to be given with one hand and taken away with another.

¹⁶⁶ See, e.g., *Luban*, *supra* note 27, at 243–45 (discussing *Buckhannon*'s negative impact on supply of legal services).

¹⁶⁷ See, e.g., *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 237 (3d Cir. 1998); *Bishop v. Sweeney*, No. 02-550-SLR, 2003 U.S. Dist. LEXIS 690, at *5–6 (D. Del. Jan. 16, 2003). *Contra* *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 259 (1st Cir. 2003).

¹⁶⁸ *JAMES W. MOORE ET AL.*, 3A *MOORE'S FEDERAL PRACTICE* § 17.6, at 17-213 (2d ed. 1990).

¹⁶⁹ In my opinion, *Collinsgru* and its progeny are misguided. The statute in fact confers rights on the parents, and its dominant approach is to confer rights on the parent that she may (or may not) exercise for the child's welfare. Thus the court may deny the non-attorney parent the ability to represent the child in a pro se action, but cannot deny the parent the right to represent herself. See *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997) (upholding right of parent to present her own case). Nevertheless, *Collinsgru* and the cases that follow it will inevitably compound the problems that stem from applying *Buckhannon* to special education cases.

stated that courts may award fees on consent decrees. Even that term, however, requires translation in the context of IDEA. A due process hearing officer is not a judge with full powers to issue injunctions and is unlikely to title anything a "consent decree." Instances in which courts have awarded fees for settlements include cases disposed of by agreed orders entered by hearing officers, some cases resolved by written agreements reached at mediation, as well as cases that made it all the way to court and were settled there. In addition, there are cases from other contexts that might apply by analogy to IDEA cases litigated in court. In some of these, courts have awarded fees to parties who prevailed in a stipulation to dismiss and in various agreed orders that were not consent decrees.

1. Agreed Orders Entered by Hearing Officers

Perhaps the closest special education administrative analogue to a consent decree is when a hearing officer enters an agreed order calling for the school district to do something significant for the child in the future. One court considering such an arrangement had little difficulty concluding that the parents could be shown to be prevailing parties entitled to fees. In *Brandon K. v. New Lenox School District*,¹⁷⁰ the judge denied a motion to dismiss a fees claim when the parties had reached a settlement before the hearing, and the agreement was then transcribed and entered into the due process hearing record as an agreed order of the hearing officer. The court contrasted that disposition with a purely private settlement and commented:

The fact . . . that the plaintiffs and the District came to an agreement prior to the official commencement of an administrative hearing does not conclusively establish that the settlement negotiations were private. A consent decree is defined as a "contract of the parties entered upon the record with the approval and sanction of a court of competent jurisdiction, which cannot be set aside without the consent of the parties".¹⁷¹

The court concluded:

In this case, it is undisputed that the terms of the settlement, including placement of Brandon K. and Brittany K. at a private school and direction to draft an IEP for each child, were transcribed and entered into the due process hearing [record] as a formal Agreed Order of the Hearing Officer Interpreting all the facts in favor of the plaintiffs, the legal relationship between the plaintiffs and the District changed when the settlement terms were issued as an Agreed Order by an impartial hearing officer. Accordingly, the plaintiffs may be entitled to prevailing

¹⁷⁰ No. 01 C 4625, 2001 U.S. Dist. LEXIS 20006 (N.D. Ill. Dec. 3, 2001).

¹⁷¹ *Id.* at *7-8 (quoting BARRON'S LAW DICTIONARY 97 (1996); additional citation omitted).

party status.¹⁷²

2. Written Agreements Reached at Mediation

Agreements reached at mediation that head off an impending hearing are a more difficult case. Allowing fees for settlements reached at mediation would, of course, go a ways toward reconciling the tension between IDEA's policy in favor of prompt settlement of disputes and *Buckhannon*'s insistence that only some forms of settlement are worthy of fees. Courts may be more willing to apply *Buckhannon* to IDEA if the parents have the safe harbor of being able to settle their cases at mediation and still have *Buckhannon* interpreted so as not to deny a subsequent application for fees. That analysis works, of course, only if the courts believe that the forms of settlement reached at mediation are sufficiently analogous to consent decrees and other judicially approved settlements that would support fees in a court case under *Buckhannon*.

A number of courts believe these forms of settlement are sufficiently close to what *Buckhannon* approves, and have upheld fee award requests for cases settled at mediation, while nonetheless agreeing that *Buckhannon* applies fully to IDEA cases. In *Ostby v. Oxnard Union High*,¹⁷³ the parties entered into a "Final Mediation Agreement" by which the school district agreed to pay for a private school placement for a student with disabilities; the written agreement was signed by the parties and the mediator and filed with the state's Special Education Hearing Office.¹⁷⁴ The court denied the school district's motion for judgment on pleadings on the claim the parents brought for attorneys' fees. The court reasoned that under controlling Ninth Circuit precedent, a settlement agreement that affords the claimant a legally enforceable instrument makes that person a prevailing party, irrespective of any suggestion in *Buckhannon* that only consent decrees or their equivalent merit this treatment.¹⁷⁵ The court said that if the parents' description of the settlement arrangements was accurate, the legally enforceable agreement took the case outside *Buckhannon* and made them prevailing parties.

The enforceability of the settlement agreement has proven persuasive in supporting fee awards even in places that lack controlling precedent of the sort on

¹⁷² *Id.* at *8; see also *D.M. v. Bd. of Educ.*, 296 F. Supp. 2d 400, 405–06 (E.D.N.Y. 2003) (awarding fees for settlement stipulation embodied in hearing officer order); *M.S. v. N.Y. City Bd. of Educ.*, No. 01 CIV. 4015 (CBM), 2002 WL 31556385, at *4–6 (S.D.N.Y. Nov. 18, 2002) (awarding fees when settlement read into record and so ordered by hearing officer).

¹⁷³ 209 F. Supp. 2d 1035 (C.D. Cal. 2002).

¹⁷⁴ *Id.* at 1037.

¹⁷⁵ *Id.* at 1039–40 (citing *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002), discussed *infra* text accompanying notes 191–99). The court noted an apparent conflict between the Ninth Circuit approach and that taken by the Second Circuit. *Id.* at 1040–41 (citing *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119 (2d Cir. 2002), discussed *supra* text accompanying notes 106–14 and *infra* text accompanying note 184).

which *Ostby* relied. In *K.R. v. Jefferson Township Board of Education*,¹⁷⁶ the parties settled the case at mediation and signed an agreement, which the school district implemented. The parents then sued for fees.¹⁷⁷ The court rejected the argument that *Buckhannon* barred a fees award, declaring the Notice of Agreement to be “more than a mere ‘catalyst’ for change. It is instead a legally enforceable instrument, and one that is sufficient to trigger an award of fees under the IDEA.”¹⁷⁸ This legal enforceability makes the agreement sufficiently similar to a consent decree to distinguish *Buckhannon* on both language and facts. The underlying reasoning is that IDEA affords fees to parents who prevail in the administrative process,¹⁷⁹ but the nature of the administrative process in IDEA cases is such that there will never be a consent decree unless the case is appealed to a court. In that process, hearing officers do not issue consent decrees or other injunctions. Even decisions in fully litigated cases are enforceable not by contempt sanctions but by the state educational agency, which may withhold funds or otherwise take action against districts that fail to implement hearing officer decisions.¹⁸⁰ The state educational agency has similar power to enforce an agreement reached at mediation under its general responsibility for ensuring that all the requirements of IDEA are met throughout the state and that all school districts’ educational programs for children with disabilities conform to the requirements of the state agency.¹⁸¹ The United States Department of Education’s regulations facilitate the enforcement of settlements reached at mediation by

¹⁷⁶ No. 00-Civ.-5270 (WGB), 2002 U.S. Dist. LEXIS 13267 (D.N.J. June 25, 2002).

¹⁷⁷ *Id.* at *5–6.

¹⁷⁸ *Id.* at *16 n.7. The court reserved the issue whether the litigation led to the agreement or whether the same relief had been offered before due process hearing request was filed; accordingly, it denied the plaintiffs’ motion for summary judgment on the ground that issues of fact existed on causation. *Id.* at *21.

¹⁷⁹ 20 U.S.C. § 1415(i)(3)(B) (2000); see *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188 (5th Cir. 1990) (allowing fees when parents prevailed at hearing).

¹⁸⁰ See 34 C.F.R. § 300.661(c)(3) (2002) (“A complaint [to the state educational agency] alleging a public agency’s failure to implement a due process decision must be resolved by the SEA [State Educational Agency].”). Some precedent also supports the conclusion that due process decisions may be enforced in a lawsuit filed in court. See *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 279 (3d Cir. 1996) (permitting case to proceed under 42 U.S.C. § 1983 to enforce due process hearing decision); *Robinson v. Pinderhughes*, 810 F.2d 1270, 1274 (4th Cir. 1987) (same); *Eddins v. Excelsior Indep. Sch. Dist.*, No. 9:96-CV-108, 1997 WL 470353 (E.D. Tex. Aug. 6, 1997) (magistrate judge recommendation) (upholding section 1983 action to enforce settlement agreement embodied in order of hearing officer). The point remains, however, that hearing officer decisions are not comparable to injunctions, which are enforceable by contempt proceedings. IDEA hearing decisions are enforceable only by a separate administrative procedure or by the filing of a lawsuit, just as IDEA settlement agreements are.

¹⁸¹ See 20 U.S.C. § 1412(a)(11)(A)(ii) (2000).

requiring that they be set forth in a written mediation agreement.¹⁸² Therefore, according to the rationale of the court, a written mediation is the practical equivalent of a consent decree, given the differences in context between the due process hearing procedure and judicial procedure.

Not every court has accepted the idea that a mediation agreement is sufficiently close to the kind of disposition that supports fees under *Buckhannon*,¹⁸³ and the Second Circuit in *J.C.* made a point of distinguishing an IEP from *Buckhannon*'s consent decree example, stating that although the IEP is enforceable, it does not carry a judicial sanction.¹⁸⁴ These holdings, however, do not acknowledge the reality that no IDEA administrative disposition ever carries a judicial sanction, yet fees are to be awarded for parents' success in the process.

3. Cases Settled During Judicial Proceedings

Some special education cases that have gone to court and have settled with non-consent decree dispositions have been found to support fees. For example, in the district court decision in *Christina A. v. Bloomberg*,¹⁸⁵ the court awarded fees for the plaintiff's achievement of a settlement agreement that was approved by the district court with retention of jurisdiction. The court recognized that the agreement was not a formal consent decree, but ruled that it served "essentially the same purpose"¹⁸⁶ and said the retention of jurisdiction was "the necessary judicial imprimatur"¹⁸⁷ on the material alteration of the legal relationship of the parties.¹⁸⁸ The court thus limited the reach of *Buckhannon* in the judicial context that *Buckhannon* discussed directly. This step was too much for the Eighth Circuit, which ruled that because a violation of the dismissal order "would not support a citation for contempt," the retention of jurisdiction did not take the case

¹⁸² 34 C.F.R. § 300.506(b)(5) (2002).

¹⁸³ See *Jose Luis R. v. Joliet Township High Sch. Dist. 204*, No. 01 C 4798, 2002 WL 54544 (N.D. Ill. Jan. 15, 2002) (denying fees for settlement agreement reached at mediation following hearing request, when agreement had been read into record before hearing officer without statement of approval by hearing officer).

¹⁸⁴ *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002) (overturning award of fees when hearing officer dismissed due process hearing as moot after district made changes in IEP and dropped expulsion proceedings).

¹⁸⁵ 167 F. Supp. 2d 1094 (D.S.D. 2001), *rev'd*, 315 F.3d 990 (8th Cir. 2003). The case asserted due process claims as well as claims under IDEA, all stemming from policies and practices at various juvenile facilities in South Dakota. *Id.* at 1096-97.

¹⁸⁶ *Id.* at 1098-99.

¹⁸⁷ *Id.* (quoting *Buckhannon*, 532 U.S. at 605).

¹⁸⁸ For an additional example, see *Sabatini v. Corning-Painted Post Area School District*, 190 F. Supp. 2d 509, 519 n.3 (W.D.N.Y. 2001) (distinguishing *Buckhannon* and awarding fees when action terminated in settlement agreement incorporated in consent order, following entry of preliminary injunction).

outside the *Buckhannon* rule.¹⁸⁹ Nevertheless, courts in other circuits may find the district court's view persuasive.

4. Settlements in Analogous Contexts

In contexts other than IDEA special education cases, courts have considered the application of *Buckhannon* to negotiated dispositions that are neither judicial decisions on the merits nor formal consent decrees. In some situations, *Buckhannon*'s reach has fallen short. The cases include one instance in which a court permitted fees on a stipulation to dismiss, and others in which courts entered agreed orders that did not have the designation or complete character of a consent decree.

a. Voluntary Dismissal

The Ninth Circuit Court of Appeals has ruled that when a legal proceeding leads to an enforceable change in policy, the plaintiff has prevailed and is entitled to fees, *Buckhannon* notwithstanding. This is so even if the underlying claim is voluntarily dismissed, the typical disposition for a case that the parties settle.¹⁹⁰ In *Barrios v. California Interscholastic Federation*,¹⁹¹ a baseball coach who used a wheelchair sued under the Americans with Disabilities Act after restrictions were placed on his on-field coaching. The parties resolved the case by an agreement calling for payment of damages and relief from the restrictions, and the court entered judgment according to the settlement agreement's terms.¹⁹² However, the court subsequently vacated the judgment and then denied plaintiff's motion for attorneys' fees.¹⁹³ Eventually, the parties stipulated to dismiss the case with prejudice, the stipulation being silent regarding fees.¹⁹⁴ On an appeal from the denial of the fees motion, the court of appeals ruled that Barrios had prevailed under the terms of the agreement and obtained what he sought from the

¹⁸⁹ *Christina A.*, 315 F.3d at 993–94 (8th Cir. 2003). The dissent took issue with this reasoning, pointing out that the Eighth Circuit affirmed a district court order enforcing a settlement agreement when the case was dismissed with prejudice but with retention of jurisdiction. *Id.* at 998 (Melloy, J., dissenting) (citing *Gilbert v. Monsanto*, 216 F.3d 695 (8th Cir. 2000)).

¹⁹⁰ See generally FED. R. CIV. P. 41(a)(1) (providing for notice of dismissal and stipulation of dismissal).

¹⁹¹ 277 F.3d 1128 (9th Cir. 2002).

¹⁹² *Id.* at 1133.

¹⁹³ *Id.* The district court's decision preceded *Buckhannon*, but the court concluded that the relief was de minimis and thus did not support fees. The court of appeals overturned that conclusion. *Id.* at 1135–36.

¹⁹⁴ *Id.* at 1133.

litigation.¹⁹⁵ It noted the applicability of *Buckhannon*'s passage about a plaintiff prevailing only when the party receives a favorable judgment or consent decree, but concluded that the Supreme Court's language was dicta that did not bind the lower courts.¹⁹⁶ The court went on to rule that the legally enforceable policy change that plaintiff had obtained made him a prevailing party.¹⁹⁷ As the *Ostby* court recognized, reading *Buckhannon*'s comment about prevailing only when a party receives a favorable judgment or consent decree as dicta severely limits the case.¹⁹⁸ Other courts have rejected the reading and denied fees when the case has been settled by a notice or stipulation to dismiss.¹⁹⁹

Whether this limit on *Buckhannon* is justified is a difficult problem. A strong argument exists that *Buckhannon* was wrongly decided; nonetheless, the precedent binds the lower courts. If the binding effect of Supreme Court precedent applies merely to cases that are precisely analogous to its facts, the applicability of *Buckhannon* is quite narrow. Plaintiffs in *Buckhannon* prevailed because the legislature gave them what they wanted; the motivations for actions taken by legislatures might be viewed as so inherently unknowable as to never support the conclusion that a lawsuit caused the change and made the plaintiff the prevailing party.²⁰⁰ The *Buckhannon* Court did not apply that reasoning, however. It instead reasoned that no party can prevail within the meaning of the attorneys' fees statutes unless there is a judicially sanctioned change in the legal relationship of the parties.²⁰¹ The role of the court in doing something for the party appears crucial to the result under the approach the Court adopted, even if the doing something is simply signing off on the parties' agreement.²⁰² A consent decree, the Court's example of a settlement that still permits the party to be deemed the prevailing party, has that judicial imprimatur, even though it lacks such things as a conclusion that the defendant has engaged in wrongdoing. By ignoring the requirement for a judicial sanction in the settlement it said would

¹⁹⁵ *Id.* at 1134.

¹⁹⁶ *Id.* at 1135 n.5.

¹⁹⁷ *Barrios v. California Interscholastic Fed'n*, 277 F.3d 1128, 1135 (9th Cir. 2002); *see also* *Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1087 (9th Cir. 2003) (extending *Barrios* to case without monetary relief when plaintiffs obtained safeguards against inappropriate transfers from developmental center to other placements through settlement).

¹⁹⁸ *See Ostby v. Oxnard Union High*, 209 F. Supp. 2d 1035, 1039–42 (C.D. Cal. 2002) (discussing *Barrios*); *see also Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 45 (D.D.C. 2002) (approving *Barrios*, further reasoning that "entering into a private settlement agreement does alter the legal relationship of the parties in a real and substantial manner").

¹⁹⁹ *See* cases cited *supra* notes 138–40.

²⁰⁰ *See Weber*, *supra* note 15, at 281 (discussing dubiousness of determinations of legislative motivation).

²⁰¹ *See Buckhannon*, 532 U.S. at 605 (requiring "judicially sanctioned change in the legal relationship of the parties").

²⁰² *See id.* (requiring "judicial imprimatur on the change").

support fees, the Ninth Circuit refused to apply the Supreme Court's reasoning, and its distinction of the case is not fully persuasive.

Nevertheless, one may argue that lower courts, who have the opportunity to observe more cases and observe them more closely than the Supreme Court can, should be free to make inroads on the reasoning of the Court when that reasoning is contrary to the underlying intentions of the law. Professor Karl Llewellyn wrote that although courts bound by precedent must not overrule or ignore it, they may distinguish it, read it narrowly, or follow an approach that leads in a contrary direction if the approach has independent support.²⁰³ None of these techniques is illegitimate if done openly.²⁰⁴ The merit of the technique in a given case depends on whether it sufficiently honors the policies behind stare decisis: preservation of the authority of the higher court,²⁰⁵ certainty and finality in the law's application,²⁰⁶ allowance for expertise,²⁰⁷ and judicial economy.²⁰⁸ Balanced against these concerns are furtherance of the policy of the underlying statutory or constitutional law,²⁰⁹ sensitivity to individual case facts,²¹⁰ and adaptation to social conditions and their change.²¹¹ In *Barrios*, the narrow reading of *Buckhannon* was certainly open; it was legitimate as far as that criterion is concerned. Its broader fidelity to the policies underlying stare decisis and sensible legal development hinges on its fidelity to congressional purposes in the attorneys' fees law and its more sensitive reading of the facts before it than the Supreme Court's reading of the facts in *Buckhannon*.²¹²

²⁰³ KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 84-91 (1960).

²⁰⁴ Compare *id.* at 84-85 ("Legitimate Techniques"), with *id.* at 85-86 ("Illegitimate Techniques"). Llewellyn's examples draw primarily on the decisions of state courts of last resort in situations where the court does not overrule the precedent. Elsewhere, Llewellyn stresses the point that judicial creativity, *id.* at 402, and in particular, the distinguishing of precedent, *id.* at 287, must be done openly so as to be subject to criticism from knowledgeable observers. See also *id.* at 256 ("*Deliberately to turn the back upon a pertinent but uncomfortable authority, leaving it unmentioned . . . , this is sin against the nature of our case law.*").

²⁰⁵ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (stressing importance of following Supreme Court precedent in respect for Court's role).

²⁰⁶ See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), overruled by *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

²⁰⁷ See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987).

²⁰⁸ See Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 65 (1989).

²⁰⁹ See *Barden v. Northern Pac. R.R. Co.*, 154 U.S. 288, 317 (1894).

²¹⁰ See LLEWELLYN, *supra* note 203, at 121-26 (discussing "situation-sense" and "situation-facts").

²¹¹ See Comment, *The Attitude of Lower Courts to Changing Precedents*, 50 YALE L.J. 1448, 1456-57 (1941).

²¹² See generally Weber, *supra* note 69, at 422-426 (discussing propriety of lower courts' placing limits on applicability of Supreme Court precedent with respect to statute now codified as IDEA).

Additional dismissal cases that push *Buckhannon*'s bounds nearly as far as *Barrios* are *American Disability Ass'n v. Chmielarz*,²¹³ *Roberson v. Giuliani*,²¹⁴ and *National Coalition for Students with Disabilities v. Bush*.²¹⁵ In *American Disability Ass'n*, the court of appeals reversed a denial of attorneys' fees in a case in which plaintiffs contended that physical barriers at the defendant's gas station violated the ADA.²¹⁶ The parties' settlement called for the defendant to make various modifications on the property and further provided that the parties agreed the plaintiff was entitled to fees, but could not agree on the amount, so the issue would be submitted to the court by motion.²¹⁷ The parties then submitted to the court a stipulation calling for voluntary dismissal with prejudice.²¹⁸ The district court entered a final order of dismissal in which it "approved, adopted and ratified" the stipulation to dismiss, and retained jurisdiction "solely for the purpose of enforcing the Settlement Agreement."²¹⁹ Disagreeing with the district court, which denied the subsequent fees motion, the court of appeals said *Buckhannon* permits fees "even absent the entry of a formal consent decree, if the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement"²²⁰ The creation of this authority "clearly establishes a 'judicially sanctioned change in the legal relationship of the parties' as required by *Buckhannon*"²²¹

Roberson involved a challenge to various administrative procedures regarding public welfare programs.²²² The parties executed an agreement that the practices would be changed in consideration for the dismissal of the case.²²³ The agreement reserved the issue of fees for determination upon application to the court.²²⁴ After signing the agreement, the parties submitted a stipulation and order of discontinuance, which acknowledged the settlement agreement, dismissed the plaintiffs' claims with prejudice, and provided that the court would

²¹³ 289 F.3d 1315 (11th Cir. 2002).

²¹⁴ 346 F.3d 75 (2d Cir. 2003).

²¹⁵ 173 F. Supp. 2d 1272 (N.D. Fla. 2001).

²¹⁶ *Am. Disability Ass'n*, 289 F.3d at 1317.

²¹⁷ *Id.* at 1317–18.

²¹⁸ *Id.* at 1318.

²¹⁹ *Id.*

²²⁰ *Id.* at 1320.

²²¹ *Id.* (relying in part on *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002)) ("We doubt that the Supreme Court's guidance in *Buckhannon* was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly."); see also *Smalbein v. City of Daytona Beach*, 353 F.3d 901 (11th Cir. 2003) (applying *National Ass'n* and reversing denial of fees when case dismissed but jurisdiction retained to enforce settlement; § 1983 police excessive force case).

²²² *Roberson*, 346 F.3d at 77.

²²³ *Id.* at 77–78.

²²⁴ *Id.* at 78.

retain jurisdiction over the settlement agreement for enforcement purposes.²²⁵ The order did not, however, incorporate the agreement itself.²²⁶ The court of appeals reversed the district court's denial of fees, ruling that *Buckhannon* cited consent decrees merely as an example of judicial action that could convey prevailing party status.²²⁷ The retention of jurisdiction and the fact that the agreement was conditioned on the retention of jurisdiction made the settlement sufficiently similar to a consent decree and imposed an adequate judicial imprimatur.²²⁸ The fact of dismissal was unimportant.²²⁹

In *National Coalition*, the district court awarded fees in an action under the Voter Registration Act brought by persons with disabilities.²³⁰ The case was settled by a dismissal of claims and an order requiring the state governor to abide by a settlement agreement.²³¹ The court reasoned that *Buckhannon* drew a line between private settlements and consent decrees, but concluded that, since the order and judgment incorporated the settlement terms by reference and provided for retention of jurisdiction to enforce the provisions of the settlement, the case was nearer to the consent decree side of the line.²³² Though the *American Disability Ass'n*, *Roberson*, and *National Coalition* cases all involved dismissals, they are easier to distinguish from *Buckhannon* than *Barrios* because they had clearer indications of judicial approval of the settlement terms, at least to the extent that they featured explicit retentions of jurisdiction for enforcement of the settlement.

b. Agreed Orders Other than Consent Decrees

Dismissals are a category on which courts following *Buckhannon* may well disagree. With near unanimity, however, courts have been willing to entertain fees applications when plaintiffs prevailed through various kinds of court orders that are neither outright dismissals nor formal consent decrees. These cases include a voter districting dispute settlement in which the court entered an order

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 81.

²²⁸ *Roberson v. Giuliani*, 346 F.3d 75, 82–84 (2d Cir. 2003).

²²⁹ *See id.* (disagreeing with *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003), discussed *infra* text accompanying notes 306–13).

²³⁰ *See* 173 F. Supp. 2d 1272, 1279 (N.D. Fla. 2001) (finding that *Buckhannon* bars fees for private settlements but not consent decrees, and concluding that order and judgment requiring parties to abide by settlement agreement and dismissing plaintiffs' claims supported fees award; declaring: "An order requiring a defendant to comply with an agreement—like an order compelling a defendant to do anything else of substance—constitutes a 'change in the [parties'] legal relationship' . . .") (quoting *Buckhannon*, 532 U.S. at 604).

²³¹ *Id.* at 1275.

²³² *Id.* at 1278–79.

governing elections until the next census,²³³ a civil rights retaliation action settled by an order memorializing an agreement to dismiss disciplinary actions against two amateur hockey players,²³⁴ and a sexual harassment case settled by an accepted Rule 68 offer of judgment.²³⁵

The prevalence of this interpretation is unsurprising.²³⁶ Although the majority in *Buckhannon* spoke of consent decrees and enforceable judgments on the merits as examples of material alteration of the parties' legal relationships,²³⁷ it did not say that those were the only examples, and the dissent, without cavil from the majority, said it understood the decision to be requiring "a court entry memorializing [the] victory. . . . A court-approved settlement will do."²³⁸ If this characterization is accurate, at the very least anything beyond a dismissal will support fees if the claimants get some significant portion of what they wanted from the litigation.

²³³ *Vasquez v. County of Lake*, No. 01 C 6541, 2002 U.S. Dist. LEXIS 19253 (N.D. Ill. Oct. 9, 2002) (awarding fees for settlement of election-districting case after court found original districting plan unlawful, county adopted revised plan, and court then entered an order directing that revised plan was to govern all applicable elections until next decennial apportionment; noting that court retained jurisdiction and plaintiffs could seek remedy for breach in same court).

²³⁴ *Johnny's IceHouse, Inc. v. Amateur Hockey Ass'n of Ill.*, No. 00 C 7363, 2001 WL 893840, at *3 (N.D. Ill. Aug. 7, 2001) (finding that order memorializing agreement "subjected what would otherwise have been merely a private agreement to judicial oversight and enforcement").

²³⁵ *Aynes v. Space Guard Prods., Inc.*, 201 F.R.D. 445, 450 (S.D. Ind. 2001) (noting that although "an accepted offer of judgment under Rule 68 is neither a judgment on the merits nor a court-ordered consent decree [it] is enforceable against Defendant by this court, unlike the resolution effected by a private settlement," causing material alteration of parties' legal relationship); see also *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 852 n.3 (8th Cir. 2002) (affirming award of fees on class action settlement of unspecified type in Title VII action, distinguishing *Buckhannon*), *aff'ing* No. CIV 6:96-155 DWF RLE, 2001 WL 667778 (D. Minn. June 12, 2001) (referring to injunction and also to settlement in describing disposition of underlying claim).

²³⁶ Nevertheless, not all courts agree with this interpretation. See *Roberson v. Giuliani*, No. 99 CIV 10900 DLC, 2002 WL 253950, at *2 (S.D.N.Y. Feb. 21, 2002) (denying fees in food stamp benefits case settled by "Stipulation and Order of Discontinuance" in which plaintiffs withdrew claims but court retained jurisdiction over the settlement for enforcement by any intended beneficiary of the agreement), *rev'd*, 346 F.3d 75 (2d Cir. 2003).

²³⁷ *Buckhannon*, 532 U.S. at 604.

²³⁸ *Id.* at 622 (Ginsburg, J., dissenting). See generally *Johnny's IceHouse*, 2001 WL 893840, at *3 n.2 (noting risks of relying on dissents' characterizations of majority holdings, but commenting that Justice Ginsburg's dissent fairly stated *Buckhannon*'s holding).

C. Challenging District Policies of Refusal to Pay Fees

If a parent who achieves a special education settlement fails to persuade the court either that *Buckhannon* is irrelevant to IDEA cases or that the settlement instrument used in her case is one that counts as “prevailing,” there remains a third option: challenge the school district’s refusal to agree to pay fees as a violation of IDEA. In the wake of *Buckhannon*, school districts may be inclined to minimize their expenditures by offering to settle for anything but attorneys’ fees, conditioning the acceptance of the settlement agreement on the parent’s waiver of any award. In doing so, the school district would pit the parent against the parent’s lawyer. The parent would want the maximum services for the child; the other the maximum fee. In *Johnson v. District of Columbia*,²³⁹ the court denied a motion to dismiss a claim that a school district’s consistent policy or practice of conditioning settlement offers on fee waivers violates IDEA. The court declared that the policy “could reflect the intentional creation of a conflict of interest between plaintiffs and plaintiffs’ counsel in an attempt to deprive plaintiffs of their rights to fees and counsel.”²⁴⁰

The Supreme Court dealt with a somewhat similar situation in *Evans v. Jeff D.*²⁴¹ In that case, a class of plaintiffs sued state officials over alleged violations of laws pertaining to education and treatment of children with disabilities.²⁴² The defendants eventually proposed a settlement that offered virtually all the injunctive relief the plaintiffs had demanded, but also provided that plaintiffs waived all fees and costs.²⁴³ Plaintiffs accepted the agreement; however, upon the district court’s consideration of the settlement pursuant to Federal Rule of Civil Procedure 23(e), they asked the court to disapprove the fee waiver.²⁴⁴ The district court refused, though the court of appeals reversed.²⁴⁵ The Supreme Court agreed with the district court and reinstated the fees denial.²⁴⁶ In their first argument to the Court, plaintiffs contended that conditioning the settlement on the waiver placed the plaintiffs’ lawyers in an ethical dilemma. The Supreme Court ruled that any conflict of interest was not an “ethical” dilemma. The lawyers’ ethical duties were to serve their clients, not to collect a fee award for themselves.²⁴⁷

The Court then considered plaintiffs’ second argument, that permitting the

²³⁹ 190 F. Supp. 2d 34, 42–48 (D.D.C. 2002). The court denied plaintiffs’ motion for preliminary injunctive relief on the claim, however. *Id.* at 47–48.

²⁴⁰ *Id.* at 47.

²⁴¹ 475 U.S. 717 (1986).

²⁴² *Id.* at 720–21.

²⁴³ *Id.* at 722.

²⁴⁴ *Id.* at 724.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 742–43.

²⁴⁷ *Evans v. Jeff D.*, 475 U.S. 717, 728 (1986).

defendants to do what they did ran contrary to the Civil Rights Attorneys' Fees Act.²⁴⁸ The Court concluded that it did not. The Act does not make fees mandatory, and the Court speculated that there were some instances in which cases would not settle but for the waiver of fees.²⁴⁹ The Court stressed the desire of defendants who settle to know their entire liability, including that for fees. If the district court always needed to decide the fees, the magnitude and unpredictability of the post-settlement awards could be expected to keep defendants from settling cases.²⁵⁰ The Court made no exception for legal services lawyers who are barred from collecting fees directly from their clients and thus cannot make pre-litigation contingent fee agreements maintaining the client's liability for fees at the conclusion of the litigation.²⁵¹

The typical special education case is not exactly analogous to *Jeff D.* The absence of class action status means that there is no mandatory review of settlement terms at all and, as noted, hearing officers may or may not indicate approval of settlements and enter them as agreed orders. *Jeff D.*'s conclusion, however, that neither the lawyer's ethical obligation to the client nor the Civil Rights Attorneys' Fees Act bars fee waivers would appear to defeat the argument that either ethics or the IDEA fees provisions act as a bar. The IDEA fees provisions are no more mandatory than are those of the Civil Rights Attorneys' Fees Act. The policy in favor of settlement is stronger in IDEA cases for the reasons outlined above,²⁵² but, at least according to the Court's view, fee waivers increase, rather than decrease, the prospects for settlement. The fact that *Jeff D.* was a class action may provide a means to distinguish it from the typical special education case, but it is hard to argue that the distinction should make a difference in the treatment of fee waivers.

The most convincing basis on which to distinguish *Jeff D.* is the one that the *Johnson* court alluded to in discussing the "intent to undermine" the ability to obtain counsel. The existence of an ironclad policy of refusing to settle except on condition of a fee waiver is different from presenting a settlement offer with a fee waiver in a single case. If the underlying purpose of the blanket rule is to interfere with the ability of parents to retain attorneys, it is a willful effort to subvert the entitlement to an attorney that the federal statute creates. The charge that the District of Columbia Public Schools engaged in such an effort gains plausibility from the system's past failure to pay valid fee awards, a subject of protracted

²⁴⁸ *Id.* at 728–30.

²⁴⁹ *Id.* at 730–32.

²⁵⁰ *Id.* at 733–37.

²⁵¹ *See id.* at 756 n.10 (Brennan, J., dissenting) (discussing special difficulties of legal aid lawyers in collecting fees in light of decision). Significant commentary exists regarding *Jeff D.* A recent source is Luban, *supra* note 27, at 241–45 (citing additional authorities).

²⁵² *See supra* text accompanying notes 152–56 (discussing policy in favor of prompt settlement of special education cases).

litigation.²⁵³ Whether the charge could be sustained against other school districts would depend on the evidence of the existence of the policy and its underlying motivations.

D. Finding Non-Federal Civil Rights Statute Bases for Fees

Buckhannon, of course, construes the federal civil rights attorneys' fees laws. It says nothing about state laws and other bases on which fees might be awarded, even in cases that settle. The list of bases is potentially large, but at the minimum it includes state law, underlying judgments when cases settle on appeal, and litigation misconduct.

The most important implement in the parents' attorneys' toolbox would appear to be state law.²⁵⁴ State special education laws typically guarantee educational rights to children with disabilities. At times, they confer rights greater than those in the federal law.²⁵⁵ These laws frequently provide for attorneys' fees in special education proceedings,²⁵⁶ usually in language similar to one of the iterations found in the federal special education law as it has changed over the years. The states adopted these provisions during the period from 1978 to 2001 when the catalyst theory prevailed with regard to federal attorneys' fees statutes. The courts construing them should do so in accordance with the evidence of their drafters' intentions, and that will be to allow fees on settled cases in situations in which the catalyst theory would dictate that result.

In *Barrios v. California Interscholastic Federation*,²⁵⁷ described above in connection with fees on voluntary dismissals, the court considered in addition to

²⁵³ See generally *Calloway v. District of Columbia*, 216 F.3d 1 (D.C. Cir. 2000) (finding authority to award fees in special education case not limited by District of Columbia Appropriations Act); *Alegria v. District of Columbia*, No. 00-2582 (GK), 2002 U.S. Dist. LEXIS 16898 (D.D.C. Sept. 6, 2002) (combined action to collect attorneys' fees and costs in multiple special education cases); *Akinseye v. District of Columbia*, 193 F. Supp. 2d 134 (D.D.C. 2002) (class action to recover interest for late payment of attorneys' fees in special education cases), *rev'd on other grounds*, 339 F.3d 970 (D.C. Cir. 2003).

²⁵⁴ See *Mahusky*, *supra* note 27, at 42 (noting possibility of fees for settled disability rights cases under Vermont State Public Accommodations law).

²⁵⁵ See, e.g., *David D. v. Dartmouth Sch. Comm.*, 615 F. Supp. 639 (D. Mass. 1984) (finding that duties to educate children with disabilities under Massachusetts law exceeded obligations imposed by federal special education law and were enforceable in special education and federal court proceedings), *aff'd*, 775 F.2d 411 (1st Cir. 1985). But see *Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104 (D. Mass. 1999) (finding that state law does not require realization of all educational goals), *aff'd*, 229 F.3d 1133 (1st Cir. 2000).

²⁵⁶ E.g., 105 ILL. COMP. STAT. ANN. 5/14-8.02 (West 1998 & Supp. 2003). But see *Goodwin v. Sch. Admin. Dist. No. 35*, 1998 ME 263, 721 A.2d 642 (finding no basis for fees under Maine special education law).

²⁵⁷ 277 F.3d 1128 (9th Cir. 2002) (finding plaintiff entitled to fees under CAL. CIV. CODE § 54-55 (West 1982 & Supp. 2003)).

the ADA fees claim a claim under the California Disabled Persons Act attorneys' fees provision. The court pointed out that the California courts had construed that law to embrace the catalyst theory and held that the state law was an independent ground for fees in the case:

[The California statute] does not require, as a prerequisite to an award of attorneys' fees, that there be a judgment of liability.

"Moreover, a plaintiff will be considered a prevailing party where the lawsuit was the catalyst motivating the defendants to modify their behavior or the plaintiff achieved the primary relief sought."²⁵⁸

State special education laws should be construed in the same fashion when the evidence is that the drafters acted against a background of fee eligibility for cases where the parent prevails by settlement.

State law may provide for fees in other cases as well, even if the case is mooted or settled. In instances in which the state special education law does not provide for fees, or the fees provision was adopted following *Buckhannon*, fees might still be available by joining the claim under the federal or state special education law with a claim under the state disability discrimination statutes and then, in a state law version of the *Maher v. Gagne* approach,²⁵⁹ litigating the merits to settlement under the special education law and claiming fees under the state disability discrimination statute. A state court has also awarded fees to parents on the basis of a state law permitting fees for successful challenges to arbitrary and capricious administrative conduct.²⁶⁰ In addition, if a school district acts in bad faith in the administrative hearing process, it may be subject to an attorneys' fees award on that basis.²⁶¹

²⁵⁸ *Id.* at 1137 (quoting *Donald v. Café Royale, Inc.*, 266 Cal. Rptr. 804, 814 (Ct. App. 1990)). In *Tipton-Whittingham v. City of Los Angeles*, 316 F.3d 1058 (9th Cir. 2003), the court certified to the California Supreme Court the question whether attorneys' fees may be awarded under state Code of Civil Procedure and Fair Employment and Housing Act when the plaintiff was the catalyst in bringing about the relief sought by the litigation. The case involved an employment class action that led to various voluntary changes in the defendants' conduct, which mooted plaintiffs' claims and caused them to agree to dismiss the case. *Id.* at 1060–61.

²⁵⁹ See *supra* text accompanying notes 86–91 (describing basis for fees under *Maher v. Gagne*, 448 U.S. 122 (1980)).

²⁶⁰ *In re John K.*, 216 Cal. Rptr. 557 (Ct. App. 1985) (awarding fees in dispute over financial responsibility for placement of child).

²⁶¹ See *Diamond v. McKenzie*, 602 F. Supp. 632 (D.D.C. 1985) (awarding fees in absence of statutory fees provision on basis of school district's request for due process hearing with no evidence to support its proposed placement), *dismissal of app. refused*, 770 F.2d 225 (D.C. Cir. 1985); cf. *Kreher v. Orleans Parish Sch. Bd.*, 24 A.D.D. 620 (E.D. La. 1996) (awarding fees when plaintiff made unilateral modification to settlement that failed to reflect actual terms of agreement).

Even with regard to federal law, cases that settle while on appeal following a due process hearing or the judgment of a court would, of course, still be eligible for fees despite *Buckhannon*, because of the judicial imprimatur on a change in the legal relationship of the parties.²⁶² Similarly, if the school district mounts a frivolous claim or defense during the litigation, federal statutes and rules other than IDEA allow for attorneys' fees as a sanction.²⁶³

VI. LITIGATION STRATEGIES AFTER *BUCKHANNON*

Because published opinions reflect only a small fraction of litigation activity, assessing the impact of a case such as *Buckhannon* requires attention to more than just the case law. Empirical information about *Buckhannon*'s impact on parties' strategic decisions is slender, but it is possible to study the incentives its application creates with respect to the dynamics of both settlement and litigation.

A. Settlement Dynamics

As I noted when *Buckhannon* was first decided, its application to special education disputes will affect settlement negotiations.²⁶⁴ In a school district's overall budget, a dollar spent on fees for the parent's attorney is no different from a dollar spent on the child's educational services. In a parent's budget, the family bills compete against both the cost of hiring an attorney and the alternatives of buying school-day or after-school services from private providers or accepting inadequate education for the child. *Buckhannon*'s application to special education disputes means that a school district can offer to give the parent what she wants, but without fees, thus mooted the case and eliminating any fee entitlement. A rational parent who must pay her lawyer will either accept that offer, lose her fees entitlement and try to pay the fee out of the family budget, or authorize a counteroffer that includes some amount of money to pay the lawyer's bill and some amount of services diminished from the entirety of what she believes her

²⁶² See, e.g., *TD v. LaGrange Sch. Dist. No. 102*, 222 F. Supp. 2d 1062, 1063 (N.D. Ill. 2002) (noting that hearing officer decided various issues in favor of parents at hearing, and that case settled in compromise on appeal to district court), *aff'd in part and rev'd in part*, 349 F.3d 469 (7th Cir. 2003); see also *supra* text accompanying notes 142–62.

²⁶³ See 28 U.S.C. § 1927 (2000); FED. R. CIV. P. 11; FED. R. APP. P. 38; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (construing federal attorneys' fees law to permit fees against plaintiff only if action found frivolous). The primary examples of fees awarded on this basis in special education cases are instances in which the court has assessed the amount against parents or their lawyers, which is unsurprising given that the parent would be entitled to fees as a matter of course in cases in which she prevailed. See, e.g., *Caroline T. v. Hudson Sch. Dist.*, 17 Educ. Handicapped L. Rep. 348 (D.N.H. 1991) (awarding fees against parents' attorney).

²⁶⁴ See Weber, *supra* note 15, at 283.

child ought to receive. The facts of the *Johnson* case,²⁶⁵ if true, illustrate this dynamic: The school district wants to settle, but only if the parent waives fees. The parent's natural response is to split some of the difference between the fees and the offered services, accepting less of either or both.

If *Buckhannon* is construed to eliminate the possibility of fees on agreements reached at mediation,²⁶⁶ settlement dynamics will change in an additional way. A rational parent will adopt the same settlement posture that she would have put forward at mediation, but will bypass mediation and hold off on communicating the settlement position until the hearing begins and she has the prospect of persuading the hearing officer to memorialize whatever agreement is reached in an agreed order.²⁶⁷ This strategy runs the risk that settlement may not be reached at all and additional costs incurred for a result less satisfactory for either or both of the parties than the one that could have been reached at mediation.²⁶⁸ It also frustrates the special education law's policy in favor of using mediation to save costs and to reach solutions that may be superior to a litigated outcome.²⁶⁹

B. Litigation Dynamics

If *Buckhannon* comes to govern special education attorneys' fees, it will affect not only settlement dynamics, but also the dynamics of litigation. It takes no clairvoyance to predict that school districts will voluntarily change students' IEPs in order to moot cases and avoid fees. Reacting to that likelihood, parents and their lawyers will be inclined to demand more relief than they otherwise

²⁶⁵ *Johnson v. District of Columbia*, 190 F. Supp. 2d 34 (D.D.C. 2002). See generally *supra* text accompanying notes 239–40 (discussing case).

²⁶⁶ See *supra* text accompanying notes 173–84 (discussing cases granting and denying fees when parents obtained relief through agreement reached at mediation).

²⁶⁷ See *supra* text accompanying notes 170–72 (discussing cases granting fees when parents obtained relief through agreed order).

²⁶⁸ Much has been written about the benefits of mediation and similar dispute resolution processes in achieving results that are better for both parties than the sorts of results reached through litigation. See, e.g., LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2, 4, 317–19 (2d ed. 1997) (noting potential benefits of mediating disputes). Mediators encourage the parties to focus on underlying interests rather than on outcomes compelled by legal positions, facilitating a resolution that may meet both parties' interests better than a legal judgment could meet the interests of either. See AMERICAN ARBITRATION ASS'N, *PREFACE TO MODEL STANDARDS OF CONDUCT FOR MEDIATORS* (1995), quoted in AMERICAN ARBITRATION ASS'N, *TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION AND MASS TORTS RECOMMENDATIONS* 14 (1997). These benefits are leading law schools to offer increasingly sophisticated instruction in mediation and related dispute resolution processes. See Kathryn M. Dutenhaver, *Dispute Resolution and Its Purpose in the Curriculum of DePaul University College of Law*, 50 FLA. L. REV. 719 (1998).

²⁶⁹ See generally 20 U.S.C. § 1415(e) (2000) (establishing procedures to implement and encourage use of mediation of special education disputes).

would, particularly in the area of compensatory damages. They may even add class action claims as a means of avoiding mootness dismissals and the loss of fees.

1. *Voluntarily Changing IEPs and Moving to Dismiss for Mootness*

Federal courts and most state courts dismiss moot cases,²⁷⁰ just as the district court did with the underlying claim in *Buckhannon*. No fees were available for *Buckhannon*'s dismissal on the ground of mootness, despite the plaintiffs' achievement of what they wanted from suing. If *Buckhannon* applies to IDEA cases, school districts that are in doubt about the validity of their legal positions have a strong incentive to moot the parents' claim for relief before the hearing to avoid a fees award. The means to do so will not be by securing legislation—the route chosen by the defendants in *Buckhannon*. Instead, school districts will write the child a new IEP that includes all the disputed services. It is not clear whether that step will effectively moot the proceedings. After all, courts have rejected the argument that an IEP devised at settlement should be considered an alteration in the legal position of the parties that supports fees.²⁷¹ Should they accept the argument that a newly written IEP moots a due process claim?

The controlling legal principle is that voluntary cessation of illegal activity does not moot a case when the defendant remains free to resume its conduct. Even if the defendant alters its unlawful actions under the threat or reality of litigation, there will remain a claim for injunctive relief to keep the defendant from violating the law in the future.²⁷² However, unless there is some probability that the defendant will return to its old ways, the case should be dismissed.²⁷³ A school district may alter an IEP at any time, simply by calling a meeting, letting the parents make their protests, and changing the program or placement back to what it was when the parents initiated the hearing request.²⁷⁴ Some courts have

²⁷⁰ See, e.g., *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999) (dismissing IDEA claim for services as moot when student had moved); *New York State Sch. Bds. Ass'n v. New York State Bd. of Regents*, 619 N.Y.S.2d 837 (App. Div. 1994) (dismissing challenge to regulation after change in regulation).

²⁷¹ See *supra* text accompanying note 184 (discussing fees for settlement of cases by adoption of new IEP).

²⁷² *United States v. W.T. Grant Co.*, 345 U.S. 629, 635 (1953); see Annino, *supra* note 27, at 12 (suggesting use of doctrine as means to "overcome" *Buckhannon*).

²⁷³ See, e.g., *Preiser v. Newkirk*, 422 U.S. 395, 401–02 (1975) (finding challenge to transfer of prisoner moot); FALLON, *supra* note 157, at 219–20 (collecting cases). See generally Michael Ashton, Note, *Recovering Attorney's Fees with the Voluntary Cessation Exception to Mootness Doctrine After Buckhannon* Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 WIS. L. REV. 965, 990–95 (discussing difficulty of relying on voluntary cessation doctrine).

²⁷⁴ See 34 C.F.R. § 300, App. A., Question 20 (2002) ("In general, if either a parent or a

dismissed claims as moot when the IEP has changed such that there is no longer any dispute over its appropriateness and there is no claim for any retrospective relief,²⁷⁵ while other courts have refused dismissal.²⁷⁶ If there is no claim for any form of compensatory relief, the mootness doctrine justifies dismissal of cases when a child is no longer age eligible for services,²⁷⁷ has died, or has moved away and has no prospect of returning.²⁷⁸ A mere change in the IEP should not qualify as a basis for a mootness dismissal, as long as the school district is free to revert to the old program and placement for the child. Regardless of that conclusion, however, school districts can be expected to try—and often to succeed—in mooting cases simply by altering IEPs. That litigation dynamic on the part of the districts may be expected to cause responsive dynamics on the part of parents' lawyers.

2. Framing Claims for Relief

The most obvious response to the fear that the school district might try to moot the case is for the parent's attorney to pile on greater and greater demands for relief, so that no school district will be able to meet them. This, of course, is precisely the opposite of the strategy that would be advisable if *Buckhannon* is not applied to special education cases. If fees are available when the litigation either is a catalyst or leads to a judgment in which the parent achieves success, the lawyer seeking the maximum fee should frame the request for relief conservatively. Fees are reduced for incomplete success, and courts measure what the parent obtained

public agency believes that a required component of the student's IEP should be changed, the public agency must conduct an IEP meeting . . ."). Ultimate responsibility over the content of the child's IEP lies with the school district. *Id.*, Question 9.

²⁷⁵ *E.g.*, *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29 (1st Cir. 2001).

²⁷⁶ Many of these courts have ruled that the cases escape the mootness principle because they are capable of repetition, yet evading review. *See, e.g.*, *DeVries v. Spillane*, 853 F.2d 264, 268 (4th Cir. 1988) ("[IDEA] cases are classic cases for application of the 'capable of repetition, yet evading review' rule."). *See generally* *Honig v. Doe*, 484 U.S. 305, 318–23 & n.6 (1988) (applying rule in special education discipline case with regard to child susceptible to being disciplined in future); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (explaining exception to mootness doctrine for cases, such as those concerning abortion, that are capable of repetition, yet evading review). For a general discussion of special education case law concerning mootness, see WEBER, *supra* note 28, at 21:18.

²⁷⁷ *E.g.*, *Honig v. Doe*, 484 U.S. 305, 318 (1988) (dismissing claim of co-plaintiff no longer age-eligible for special education services).

²⁷⁸ *Compare* *Rodricus L. v. Waukegan Cmty. Sch. Dist. No. 60*, No. 95 C 1275, 1998 WL 341625 at *1 (N.D. Ill. June 23, 1998) (finding case moot when child and family moved out of state), *with* *Essen v. Bd. of Educ.*, No. 92-CV-1164, 1996 WL 191948 (N.D.N.Y. Apr. 15, 1996) (finding case not moot though family had moved, when family intended to return after resolution of dispute).

against what she originally sought in making the proportional reduction.²⁷⁹ A more cautious set of demands makes the ultimate success look larger. But if *Buckhannon* is the rule, the more restrained prayer for relief simply makes it easier to moot the case, and there will be no fee recovery at all.

Matters are not quite so simple as this analysis suggests, however. In fact, the parent's lawyer is in a dilemma. Outlandish demands may lead to sanctions against the party who makes them or the party's lawyer.²⁸⁰ Moreover, offer of judgment rules exist both at the due process hearing level and in federal court,²⁸¹ and the school district may use them to cut off attorneys' fees liability for the period following the offer of judgment.²⁸² Parents' lawyers' efforts to steer between the extremes may leave things about where they are with regard to demands for relief or could lead to cautious or extravagant requests depending on the personality of the advocate and that person's appetite for risk.

3. *Asserting Claims for Damages and Other Retrospective Relief*

Pending claims for compensatory education²⁸³ or monetary relief²⁸⁴ keep a case from being considered moot.²⁸⁵ The conjunction of that rule and *Buckhannon* creates an incentive for parents to demand retrospective relief. Retrospective relief is appropriate in a wide range of cases. The Supreme Court has ruled that if a school district offers a placement for a child that is not appropriate, and the parent obtains private schooling that is appropriate while pursuing the administrative process to challenge the district's placement, the parent is entitled to tuition reimbursement.²⁸⁶ The Court has not yet spoken regarding compensatory education, but the consensus of the courts of appeals is

²⁷⁹ See, e.g., *Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237, 248 (D. Mass. 1999) (awarding reduced fees when parents obtained staff and teacher training but not private placement). Some courts have denied fees altogether when parents achieved minimal success after making more extreme demands. See, e.g., *Linda W. v. Ind. Dep't of Educ.*, 200 F.3d 504, 507 (7th Cir. 1999) (denying fees when parents won compensation for tutoring but failed on main tuition reimbursement claim).

²⁸⁰ See *supra* text accompanying note 263 (discussing fee awards for frivolous claims and defenses).

²⁸¹ See 20 U.S.C. § 1415(i)(3)(D)(i) (2000); see also FED. R. CIV. P. 68.

²⁸² See *Marek v. Chesny*, 473 U.S. 1 (1985) (holding that rejection of ultimately favorable Rule 68 offer of judgment terminates accrual of fees under Civil Rights Attorneys' Fees Act).

²⁸³ *Mason v. Schenectady City Sch. Dist.*, 879 F. Supp. 215 (N.D.N.Y. 1993).

²⁸⁴ *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995).

²⁸⁵ See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608–09 (2001) (“[S]o long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case.”).

²⁸⁶ *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) (discussing reimbursement relief under IDEA); see 20 U.S.C. § 1412(a)(10)(C)(ii) (2000) (codifying rule).

that children are entitled to compensatory services when the services offered by the school district were not appropriate, but the parent did not obtain services elsewhere while challenging the district's decision.²⁸⁷ Claiming reimbursement or compensatory services may not be a surefire way of keeping the case from being moot, however. A school district intent on mooting a tuition claim may simply pay the debt to the school if the bill is outstanding or to the parents if it is not. If the claim is for compensatory schooling, the district may write the extended eligibility for services into the IEP or make some other formal commitment to provide them.

Claims for compensatory damages are harder to moot, because the parents may set any arbitrary amount for the *ad damnum*. Nevertheless, damages claims are also harder to sustain. Courts disagree about when compensatory damages other than tuition reimbursement are proper relief in special education cases.²⁸⁸ Some courts have permitted compensatory damages awards for conduct such as educational neglect,²⁸⁹ failure to provide accessible facilities,²⁹⁰ violations of procedural rights,²⁹¹ and harassment.²⁹² Others, however, have found that parents may not assert claims for damages under IDEA, either through the statute's own cause of action or a cause of action under 42 U.S.C. § 1983.²⁹³ Nevertheless,

²⁸⁷ See, e.g., *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850 (8th Cir. 2000); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184 (1st Cir. 1993); *Todd D. v. Andrews*, 933 F.2d 1576 (11th Cir. 1991); *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

²⁸⁸ See Mark C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83, 84-92 (2002) (collecting and discussing authorities).

²⁸⁹ See, e.g., *W.B. v. Matula*, 67 F.3d 484, 484, 496, 501 (3d Cir. 1995) (upholding claim for damages for delay in evaluation and placement of child with disabilities, applying 42 U.S.C. § 1983 damages claim for violation of IDEA); see also *Emma C. v. Eastin*, 985 F. Supp. 940, 945 (N.D. Cal. 1997) (sustaining compensatory damages claim under IDEA).

²⁹⁰ See, e.g., *McKay v. Winthrop Bd. of Educ.*, No. Civ. 96-131-B, 1997 WL 816505 at *1 (D. Me. June 6, 1997) (denying motion to dismiss ADA damages claims for failure to make school building accessible).

²⁹¹ See, e.g., *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 143, 148 (2d Cir. 1983) (permitting action for damages for violation of due process rights when defendant allegedly forged form, preventing exercise of procedural options).

²⁹² See, e.g., *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999) (denying motion to dismiss ADA damages claim in which teacher allegedly humiliated student with severe depression and excluded her from academic activity). See generally Weber, *supra* note 70, at 1113 (collecting and discussing authorities).

²⁹³ *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850 (8th Cir. 2000); *Sellers v. Sch. Bd.*, 141 F.3d 524 (4th Cir. 1998); *Hoekstra v. Indep. Sch. Dist. No. 283*, 103 F.3d 624 (8th Cir. 1996); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 382-83 (6th Cir. 1992). *Contra* *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) (upholding claim for damages for delay in evaluation and placement of child with disabilities, applying 42 U.S.C. § 1983 damages claim for violation of IDEA); see also *Emma C. v. Eastin*, 985 F. Supp. 940, 945 (N.D. Cal. 1997) (sustaining compensatory damages claim under IDEA).

many courts applying section 504 of the Rehabilitation Act of 1973²⁹⁴ or Title II of the ADA²⁹⁵ have allowed compensatory damages claims in special education cases when the parent can sustain a claim of bad faith conduct or gross misjudgment on the part of the school.²⁹⁶ What constitutes bad faith or gross misjudgment varies widely from court to court.²⁹⁷ Hence, in many cases there will be at least a colorable claim for compensatory damages to append to the other claims. Significant authority suggests that hearing officers lack the power to afford any damages relief other than tuition reimbursement,²⁹⁸ so a dispute that includes a damages claim will remain alive at least up through the filing of an action in court. Districts may respond to the damages claim by using the offer of judgment rules to limit the fees liability,²⁹⁹ but the damages strategy has enough to recommend it that it will likely emerge as the leading technique for avoiding mootness dismissals, even in cases that would not have included a damages claim before *Buckhannon* changed the law.

The policy implications of this strategy are not entirely positive. Certainly, parents should demand, and courts should award, damages in harassment cases and others in which teachers and others humiliate, physically or psychologically abuse, or willfully neglect children with disabilities.³⁰⁰ Deterrence and

²⁹⁴ 29 U.S.C. § 794 (2000). The Supreme Court has recently ruled that punitive damages are not available under Title II of the ADA, whose remedies are identical to those under section 504. *Barnes v. Gorman*, 536 U.S. 181, 189–90 (2002). The Court, however, did not challenge the proposition that compensatory damages are proper relief for violations of the statutes.

²⁹⁵ 42 U.S.C. §§ 12,131–12,150 (2000).

²⁹⁶ See, e.g., *Walker v. District of Columbia*, 969 F. Supp. 794 (D.D.C. 1997) (permitting liability); *T.J.W. v. Dothan City Bd. of Educ.*, 26 Individuals with Disabilities Educ. L. Rep. 999 (M.D. Ala. 1997) (same); see also *Thompson v. Bd. of Special Sch. Dist. No. 1*, 144 F.3d 574, 580 (8th Cir. 1998) (applying test but denying liability).

²⁹⁷ Compare *Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir. 1998) (finding that delay in evaluation did not constitute bad faith or gross misjudgment), with *McKellar v. Penn. Dep't of Educ.*, No. CIV.A.98-CV-4161, 1999 WL 124381, at *4–5 (E.D. Pa. Feb. 23, 1999) (finding that delay in implementing program could constitute bad faith or gross misjudgment).

²⁹⁸ See *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000) (“[E]ven if damages are available under the IDEA they should be awarded in civil actions, not in administrative hearings.”); *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 918 (6th Cir. 2000) (“[M]oney damages . . . are unavailable through the administrative process . . .”).

²⁹⁹ See *supra* text accompanying notes 281–82 (discussing offer of judgment rules).

³⁰⁰ See *Weber, supra* note 70, at 1107–10 (stressing propriety of damages relief in harassment cases); *Weber, supra* note 288, at 84–92 (cataloguing instances in which special education cases justify damages relief); Stephen C. Shannon, Note, *The Individuals with Disabilities Education Act: Determining “Appropriate Relief in a Post-Gwinnett Era,”* 85 VA. L. REV. 853, 882–86 (1999) (arguing that congressional intent supports damages relief in IDEA cases). But see *Terry Jean Seligmann, A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 534–35 (2002) (questioning policy benefits of allowing damages claims for IDEA violations).

compensation more than justify the relief in those instances.³⁰¹ But it would not be a good thing for a demand for compensatory damages to become a routine part of every special education claim. Damages claims raise the tension in any litigation and may pose an obstacle to quick settlement in those cases in which prompt services for the child should be the overriding goal. Bad faith conduct and gross misjudgment are the best-established bases for damages in special education cases,³⁰² so damages claims will inevitably be accompanied by charges of personal misconduct. These charges in turn will cause resentments and bad blood, which may lead to retaliation against the child.³⁰³

4. Making Class Action Allegations

For cases that survive the administrative process, but are at risk of mootness or non-attorneys' fees settlement offers while court proceedings are pending, an additional strategy that may save the day for the attorneys' fees claim is to add class action allegations. Not only does the mootness law make class actions subject to an easier standard than individual actions with regard to whether they continue to present a live controversy,³⁰⁴ but the Federal Rules also require that every class action settlement be approved by the district court.³⁰⁵ Thus if the case settles, the settlement will have the "judicial imprimatur" *Buckhannon* demands for cases that support fee awards.

This strategy gains support from the district court decision in *Christina A. v. Bloomberg*,³⁰⁶ though the Eighth Circuit's reversal of the fees award washes that support away. In *Christina A.*, a class of juvenile inmates at a state corrections facility obtained a settlement agreement providing for special education services and other relief. The district court approved the settlement, then dismissed the

³⁰¹ See sources cited *supra* note 300.

³⁰² See *supra* text accompanying notes 295–97 (discussing bad faith or gross misjudgment standard).

³⁰³ Long-term antagonism between parents and school districts, and consequent harm to the child, occurs from time to time in special education disputes. In one instance, a court ordered a child placed in a different school in the district on account of the hostility between the personnel in the child's home school and the parents. *Metro. Gov't v. Guest*, 28 Individuals with Disabilities L. Rep. 290 (M.D. Tenn. 1998); see also *Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 21 v. Ill. State Bd. of Educ.*, 938 F.2d 712 (7th Cir. 1991) (affirming private placement in part on basis of parental hostility towards school officials).

³⁰⁴ A certified class action stays alive even though the claims of the class representative are mooted, provided that the claims of the class members are not moot. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); see also *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) (allowing appeal of denial of certification following mootness of class representative's claim). See generally FALLON ET AL., *supra* note 157, at 236–42 (discussing mootness in class actions).

³⁰⁵ FED. R. CIV. P. 23(e).

³⁰⁶ 167 F. Supp. 2d 1094 (D.S.D. 2001), *rev'd*, 315 F.3d 990 (8th Cir. 2003).

case without prejudice and with retention of jurisdiction.³⁰⁷ The district court then entered a fees award, ruling that the plaintiffs prevailed by securing a settlement providing for services.³⁰⁸ As far as the district court was concerned, the agreement for the services was enough of a material alteration in the legal relationship of the parties, and it had a judicial imprimatur in the form of approval of the agreement and retention of jurisdiction.³⁰⁹ Though not a consent decree, the settlement was comparable to one.³¹⁰ In reversing, the Eighth Circuit acknowledged that approval of the settlement agreement determined whether it was fair, reasonable, and adequate in compliance with the federal class action rule, but said that the decision “was merely an exercise in compliance with” the Rule, and thus was not the needed judicial imprimatur.³¹¹ The court further concluded that retention of jurisdiction also failed to confer the requisite judicial blessing of the disposition.³¹² Though something more than a private settlement, the agreement was not a consent decree, and for the Eighth Circuit, only an enforceable judgment on the merits or a consent decree would fit the bill. Courts outside the Eighth Circuit may, of course, determine that the district court’s decision should carry more weight than that of the court of appeals.³¹³

Outside the special education context, case law supports the proposition that judicial approval of a class settlement suffices for a judicial imprimatur on the alteration of the legal relation of the parties. In *National Coalition for Students with Disabilities v. Bush*,³¹⁴ the court awarded fees under the National Voter Registration Act on a class action settlement after approving the settlement pursuant to the federal class action rule.³¹⁵ The court entered an order requiring compliance with the settlement agreement and retaining jurisdiction, but

³⁰⁷ See *Christina A.*, 315 F.3d at 991.

³⁰⁸ See *id.*

³⁰⁹ *Christina A.*, 167 F. Supp. 2d at 1098–99.

³¹⁰ *Id.*

³¹¹ *Christina A.*, 315 F.3d at 992–93.

³¹² *Id.* at 993–94.

³¹³ Even some members of the Eighth Circuit may find the district court’s approach more persuasive. See *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 852 n.3 (8th Cir. 2002) (affirming award of fees on class action settlement of unspecified type in Title VII action, citing *Buckhannon* in footnote in support of fees reduction, but not discussing *Buckhannon* as any barrier to fees award), *aff’g* No. CIV 6:96-155 DWF RLE, 2001 WL 667778 (D. Minn. June 12, 2001) (referring to injunction and also to settlement in describing disposition of underlying claim). The case is not mentioned in the appellate opinion in *Christina A.*

³¹⁴ 173 F. Supp. 2d 1272 (N.D. Fla. 2001). *National Coalition and American Disability Ass’n v. Chmielarz*, 289 F.3d 1315 (11th Cir. 2002), are discussed at greater length *supra* text accompanying notes 213, 215–21, 230–32 in connection with non-consent decree forms of settlement that are sufficiently comparable to consent decrees to distinguish *Buckhannon*.

³¹⁵ *Nat’l Coalition*, 173 F. Supp. 2d at 1275.

dismissed the case with prejudice.³¹⁶ The court had no hesitation in concluding that the case supported fees despite *Buckhannon*.³¹⁷ Similarly, in *American Disability Ass'n v. Chmielarz*,³¹⁸ an organizational-standing case in which the organization's role was somewhat similar to the role of a class representative,³¹⁹ the Eleventh Circuit reversed the district court's denial of attorneys' fees on a settlement in an Americans with Disabilities Act accessibility claim.³²⁰ The district court's order of dismissal specifically "approved, adopted, and ratified" the settlement and retained jurisdiction for the purpose of enforcing the agreement.³²¹ The court ruled that though the district court dismissed the case with prejudice, the approval of the settlement constituted a judicially sanctioned change in the parties' legal relationship.³²²

Though claiming class action status may lead to a judicial approval of a settlement that takes the case outside *Buckhannon*, it is not a cure-all for the *Buckhannon* syndrome. Although plaintiffs frequently succeed in asserting special education claims as class actions,³²³ not every case is a suitable candidate for class treatment. The putative class case has to meet standards of numerosity, common questions of law or fact, typicality, and representative adequacy, and then must also meet other standards: that individual adjudication would create inconsistencies or prevent the protection of class members' interests; or that the defendant has acted on grounds generally applicable to the class, making injunctive or declaratory relief appropriate for the class as a whole; or that questions of fact or law common to members of the class predominate over individual questions; and the class action is superior as a method to adjudicate the controversy.³²⁴ The facts of many special education cases are so idiosyncratic that

³¹⁶ *Id.*

³¹⁷ See *id.* at 1278 (distinguishing *Buckhannon*).

³¹⁸ 289 F.3d 1315 (11th Cir. 2002).

³¹⁹ See FED. R. CIV. P. 23.2 (treating actions by unincorporated associations in manner similar to that provided for class actions); cf. FLEMING JAMES ET AL., CIVIL PROCEDURE § 10.20, at 644 (5th ed. 2001) (noting role of class actions in permitting suit by groups of people who constitute organizations not recognized as legal entities). It appears that the plaintiff in *National Coalition* was incorporated and so could sue without the use of Rule 23 or 23.2.

³²⁰ *Am. Disability Ass'n*, 289 F.3d at 1317.

³²¹ *Id.* at 1318.

³²² *Id.* at 1321 ("The settlement, expressly approved by the district court, constitutes a 'judicially sanctioned change in the legal relationship of the parties,' and therefore the Association is a 'prevailing party' under the standards explained in *Buckhannon*.") (emphasis added) (citation omitted).

³²³ See, e.g., *T.B. v. Sch. Dist.*, No. Civ.A 97-5453, 1997 WL 786448, at *1 (E.D. Pa. Dec. 1, 1997) (certifying class in action alleging violations of IDEA child-find and procedural provisions); *Upper Valley Ass'n for Handicapped Citizens v. Mills*, 168 F.R.D. 167 (D. Vt. 1996) (granting class status in action alleging failure to respond promptly to special education complaints).

³²⁴ FED. R. CIV. P. 23(a)-(b). With regard to cases found to be proper for class treatment

even a parent eager to serve as class representative would have difficulty establishing that she is typical of a numerous group of people.³²⁵

Moreover, not every parent or parent's lawyer is eager to bring a class case. Costs of notice and administration fall on the plaintiff or her attorney and typically cannot be shifted to the opponents until the successful conclusion of the litigation.³²⁶ Obligations to work for the best interest of the class may also drive the attorney away from choices that work to the best interest of the original client.³²⁷ The challenges of class action practice are such that few litigants who would not choose the device for other reasons will opt for it as a means to avoid *Buckhannon* fee denials.

VII. PROSPECTS FOR LEGISLATIVE REFORM

Application of *Buckhannon* to special education cases undermines the goals that IDEA seeks to achieve. Are there prospects for changing *Buckhannon*'s rule, or at least for preventing its application to special education cases? A strong justification for change exists, and the change could take place at either the federal or state level of government.

The justifications are clear. In first writing about *Buckhannon*, I stressed the reallocation of resources that the case works: Parents who cannot obtain fees when the litigation causes a school district to provide relief prior to adjudication

on the ground that the common questions predominate and the class action is superior, matters pertaining to the findings include the interest of class members in individually controlling their actions; the extent and nature of any litigation concerning the controversy already begun; the desirability of concentrating the litigation in the particular forum; and the likely difficulties of managing the class action. FED. R. CIV. P. 23(b)(3)(A)-(D).

³²⁵ See, e.g., *Adrian R. v. N.Y. City Bd. of Educ.*, No. 99 Civ. 9064, 2001 WL 77066, at *4 (S.D.N.Y. Jan. 30, 2001) (magistrate judge recommendation) (denying class certification based on divergence of interests of representative and class); *Robert M. v. Hickok*, No. Civ. A. 96-4682, 1999 WL 89703, at *2 (E.D. Pa. Jan. 12, 1999) (denying class action status on basis of lack of typicality and numerosity).

³²⁶ See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (requiring class action plaintiff to bear costs of notice to class).

³²⁷ See JAY TIDMARSH & ROGER H. TRANSGRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 548 (1998). Tidmarsh & Transgrud argue:

Moreover, when the adequacy of representation requirement permits some tensions or conflicts to exist within the class, class counsel finds himself somewhat at sea in trying to figure out exactly who the client is. Is it the class representative? Is it some fictional amalgam of the hypothetical "ordinary" class member? Is it the lawyer's own view of the best interests of the class?

Id.; see also Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337 (discussing problems of control of class litigation); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (discussing internal conflicts in class actions).

will have to pay their lawyer from other resources. That loss gives them less incentive to pursue their rights under IDEA in the first place. It gives attorneys who hope to be paid less of an incentive to take special education cases. In cases that do make it to litigation, the parent has an incentive to trade relief for the child against payment of legal bills. The higher the fees, the stronger the need to settle for some amount in cash to pay them off, even if it means fewer services for the child. The child's right to free, appropriate public education suffers.³²⁸

Perhaps these policy considerations, and the striking conflict between what *Buckhannon* requires and what Congress clearly intended for IDEA and for the other statutes enacted after the catalyst theory took hold, will lead Congress to overrule *Buckhannon*, at least with regard to IDEA, and perhaps with regard to other civil rights attorneys' fees provisions. Congress overruled *Smith v. Robinson*,³²⁹ the Court's previous effort to curtail fees in special education cases.³³⁰ Even the original Civil Rights Attorneys' Fees Act of 1976 is a congressional overruling of a Supreme Court precedent, *Alyeska Pipeline Service Co. v. Wilderness Society*,³³¹ which rejected the contention that successful civil rights plaintiffs should receive fees on the theory that they act as private attorneys general.³³²

But the reality that the Supreme Court misinterpreted a statute enacted in 1990, or 1988, or 1986, or 1976 does not mean that the current Congress will set matters straight. The dynamics of the present political situation, combined with

³²⁸ See Mahusky et al., *supra* note 27, at 41 ("*Buckhannon*'s holding can be expected to markedly reduce counsels' inclination to undertake representation of civil rights plaintiffs seeking equitable relief on a contingency fee basis, thus undermining civil rights enforcement . . ."); John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 114 (2002) ("The recent decision in *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001), rejecting the catalyst theory for fee awards, is likely further to reduce the incentive to take cases.") (emphasis added); Kay Hennessy Seven & Perry A. Zirkel, In the Matter of Arons: *Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEO. J. ON POVERTY L. & POL'Y 193, 222 (2002) ("[T]he *Buckhannon* disincentive could help effectuate a further decrease in the availability of attorneys for those individuals who cannot afford to pay an attorney's hourly fee.") (emphasis added).

³²⁹ 468 U.S. 992 (1984).

³³⁰ See *supra* text accompanying notes 87-97 (discussing *Smith* and the Handicapped Children's Protection Act). Congress also prospectively overruled the Supreme Court decision that barred monetary relief against state educational agencies on Eleventh Amendment grounds, *Dellmuth v. Muth*, 491 U.S. 223 (1989). Pub. L. No. 101-476, § 604, 104 Stat. 1103, 1106 (1990) (codified as amended at 20 U.S.C. § 1403 (2000)).

³³¹ 421 U.S. 240 (1975).

³³² One may speculate that the origin of the civil rights attorneys' fees laws as a challenge to a Supreme Court interpretation explains some of the Court's subsequent efforts to limit the statute's reach. Then-Justice Rehnquist, a member of the *Alyeska Pipeline* majority, wrote *Buckhannon* as Chief Justice.

ordinary legislative inertia,³³³ are as likely to continue the status quo as change it. Although the Individuals with Disabilities Education Act is currently up for reauthorization, no one is certain whether any changes in the law will be passed,³³⁴ much less a change to the fees provision that overrules *Buckhannon* with respect to special education cases.

Thus, though children's advocates should be pushing for congressional action, more fruitful fields of endeavor may lie elsewhere. One field is the state legislatures. As noted above, courts may interpret state special education fees statutes in line with the precedent at the time of their enactment, rather than in line with *Buckhannon*. Of equal significance, in situations where the courts do not, or in jurisdictions in which there is no state attorneys' fees statute at all, legislative advocacy may produce laws that embody the catalyst rule. States are the laboratories of democracy, able to experiment with legislative regimes before they are considered at a national level.³³⁵ Continued success with catalyst fee awards at the state level may help convince federal lawmakers to restore the pre-*Buckhannon* status quo to special education and perhaps even to other civil rights fields. At the same time, the negative effects of *Buckhannon* will be undone in those jurisdictions where advocates succeed in making the state law depart from the federal precedent.

VIII. CONCLUSION

At the present time, the weight of the authority is for applying *Buckhannon* to special education disputes, and to all dispositions short of agreed orders and adjudications. But significant, well-reasoned authority supports refusing to apply *Buckhannon* to the IDEA context at all, and even if the case is applied to special education, persuasive arguments lead to the conclusion that disputes resolved at mediation should receive awards of fees when parents substantially succeed. Other doctrinal bases also exist for fee awards.

³³³ See Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 891 (2001) ("[L]egislative inertia is far from trivial. Judicial construction of a statute will . . . often determine real world effects of that statute for a very long time.") (footnote omitted). But see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) ("Congress and its committees are aware of the Court's statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported.").

³³⁴ Even before the shift in senatorial power occasioned by the 2002 elections, observers forecast that reauthorization would work only slight changes in the law. Diana Jean Schemo, *'Modest' Changes Seen for Special Education*, N.Y. TIMES, Sep. 28, 2002, at A12.

³³⁵ *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

If *Buckhannon* is applied to special education cases, I expect that defendants will play hardball and plaintiffs will respond with a form of screwball, distorting demands to meet the new realities of when fees will be awarded. The policy consequences will be grave. Legislative change could be the remedy. However, as well justified as it may be, it is far from a certainty at the federal level, and in the short term will be more likely to succeed in the states. In any instance, unless the courts agree that *Buckhannon* need not apply to special education cases, some change will be needed in order to protect the rights that Congress meant to confer on children with disabilities in the schools.

